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**TRANSCRIPT OF RECORD.**

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**Supreme Court of the United States**

**OCTOBER TERM, [REDACTED] 1926**

**No. [REDACTED] 229**

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**NEW YORK DOCK COMPANY, PETITIONER,**

**vs.**

**STEAMSHIP "POZNAN," HER ENGINES, ETC.,  
AND JOHN B. HARRIS COMPANY**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT**

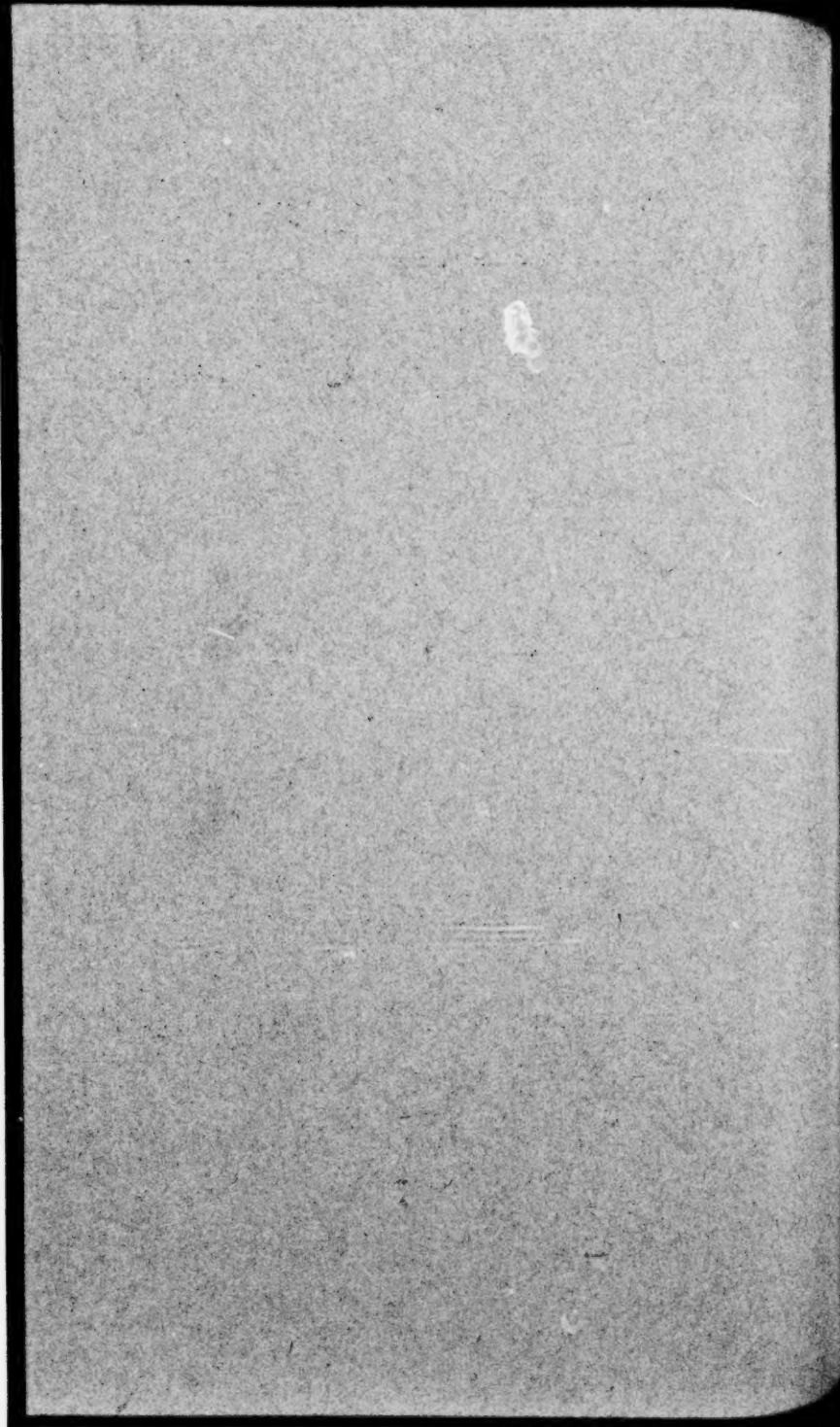
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**PETITION FOR CERTIORARI FILED OCTOBER 14, 1925**

**CERTIORARI GRANTED NOVEMBER 23, 1925**

**(31,497)**





(31,497)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 774

NEW YORK DOCK COMPANY, PETITIONER,

vs.

STEAMSHIP "POZNAN," HER ENGINES, ETC.,  
AND JOHN B. HARRIS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

|  | Original | Print |
|--|----------|-------|
| Record from the district court of the United States, southern district of New York.....                  | 1        | 1     |
| Docket entries.....  | 1        | 1     |
| Libel .....  | 3        | 3     |
| Order permitting intervention.....   | 7        | 4     |
| Notice of intervention of John B. Harris Co.....   | 9        | 6     |
| Answer of intervenor, John B. Harris Co.....   | 10       | 6     |
| Agreed statement of facts.....   | 13       | 8     |
| Exhibit A—Judgment in the case of A. M. Capen's Sons, Inc., vs. 403 Bundles of Wrapping Paper et al..... | 23       | 14    |
| Exhibit B—Letter from V. A. Wheeler to Polish American Navigation Corp., December 8, 1921....            | 27       | 17    |
| Exhibit B-1—Letter from Polish American Navigation Corp. to New York Dock Co., December 9, 1921 .....    | 29       | 18    |

|  | Original | Print |
|--|----------|-------|
| Exhibit C—Marshal's costs in the case of Davis vs.<br>S. S. Poznan, etc.....   | 30       | 19    |
| Exhibit D—Order affirming marshal's costs.....   | 34       | 22    |
| Exhibit E—Affidavit of Thomas D. McCarthy.....   | 38       | 25    |
| Exhibit F—Affidavit of Joseph P. McDonnough.....   | 39       | 26    |
| Additional agreed statement of facts.....  | 41       | 27    |
| Exhibit G—Order to show cause in the case of A. M.<br>Capen's Sons, Inc., vs. 403 Bundles of Wrapping<br>Paper, etc..... | 42       | 28    |
| Exhibits—Affidavit of Bartholomew L. Stafford.<br>C. E. Ferguson.....  | 44       | 29    |
| Matthew Delfino.....   | 50       | 34    |
| Exhibit H—Order denying motion of Acme Operat-<br>ing Corp. ....   | 52       | 35    |
| Opinion, Hand, J. ....   | 54       | 36    |
| Supplemental opinion, Hand, J. ....  | 55       | 37    |
| Supplemental opinion, Hand, J. ....  | 59       | 40    |
| Interlocutory decree.....  | 61       | 41    |
| Statement of evidence.....   | 63       | 42    |
| Appearances of counsel.....  | 63       | 42    |
| Stipulation re taking of testimony.....  | 63       | 42    |
| Argument of counsel.....   | 64       | 43    |
| Testimony of Cornelius D. Hoagland.....  | 64       | 43    |
| Thomas F. Baker.....   | 86       | 60    |
| Walter F. Firth.....   | 99       | 71    |
| Everard W. Day.....  | 104      | 75    |
| Anthony Scotto.....  | 122      | 90    |
| Walter George Cocks.....   | 127      | 94    |
| Noel E. Pilcher.....   | 135      | 101   |
| Leland B. Holly.....   | 146      | 110   |
| E. W. Day (recalled).....  | 157      | 119   |
| Colloquy between court and counsel.....  | 162      | 123   |
| Testimony of Henry V. Julier.....  | 164      | 124   |
| Stipulation of facts.....  | 172      | 131   |
| Commissioner's report.....   | 174      | 132   |
| Exceptions to commissioner's report.....   | 178      | 135   |
| Opinion, Hand, J. ....   | 181      | 137   |
| Final decree.....  | 183      | 138   |
| Notice of appeal.....  | 186      | 140   |
| Assignments of error.....  | 187      | 141   |
| Stipulation re transcript of record.....   | 192      | 144   |
| Clerk's certificate..... (omitted in printing) ..  | 193      |       |
| Proceedings in the United States circuit court of appeals,<br>second circuit.....  | 194      | 145   |
| Opinion .....  | 194      | 145   |
| Judgment .....   | 228      | 126   |
| Petition for rehearing..... (omitted in printing) ..   | 230      |       |
| Order denying petition for rehearing.....  | 233      | 167   |
| Clerk's certificate..... (omitted in printing) ..  | 234      |       |
| Order allowing certiorari.....   | 235      | 167   |

[fol. 1] **IN UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK**

**Statement of Evidence**

78—175

NEW YORK DOCK COMPANY, Libellant,  
against

S. S. "POZNAN," Her Engines, etc.

**DOCKET ENTRIES**

April 9, 1921.—Filed libel and libellant's stipulation for costs.

April 29, 1921.—No appearance. Default noted on process.

May 9, 1921.—Mention issued.

March 24, 1922.—Filed note of issue for motion to intervene by Hunt, Hill & Betts for John B. Harris Company.

April 13, 1922.—Filed affidavit and order to show cause for leave to intervene. Motion granted. (Endorsed by J. Knox, D. J.)

[fol. 2] April 13, 1922.—Filed affidavit of H. C. Field in opposition.

April 17, 1922.—Filed order permitting John B. Harris Company to intervene.

April 20, 1922.—Filed notice of intervention with intervenor's stipulation for costs.

April 20, 1922.—Filed exceptive allegations by intervenor.

April 21, 1922.—Filed note of issue for exceptive allegations.

June 10, 1922.—Filed order substituting Davies, Auerbach & Cornell as proctors for libellant.

June 22, 1922.—Filed opinion (A. N. Hand, D. J.—2055). Exceptive allegations overruled.

June 26, 1922.—Filed order entered on opinion overruling exceptive allegations.

July 17, 1922.—Filed intervenor's answer and stipulation for costs.

July 27, 1922.—Filed answers to interrogatories propounded by intervenor.

January 18, 1923.—Filed consent and order setting case for trial January 23, 1923.

March 23, 1923.—Filed agreed statement of facts and additional statement of facts.

March 23, 1923.—Filed opinion (L. Hand, D. J.).

July 13, 1923.—Filed supplemental opinion (L. Hand—2624).

July 13, 1923.—Filed interlocutory decree and order of reference to H. E. Mattison.

May 5, 1924.—Filed commissioner's report (Joseph H. Davis against SS. Poznan). Copy of report on damages—Davis against Poznan (Exhibit). Five pamphlets of testimony—New York Dock Co. against Poznan. Agreed statement of facts. Additional statement of facts.

May 5, 1924.—Filed amended and supplemental libel [fol. 3] (Davis against Poznan) (Exhibit). Final decree (Davis against Poznan) (Exhibit).

May 12, 1924.—Filed notice of filing commissioner's report and copy of report.

June 11, 1924.—Filed notice of motion to confirm report of commissioner.

June 11, 1924.—Filed notice of motion and exceptions to report of commissioner.

June 11, 1924.—Filed exceptions to report of commissioner.

June 11, 1924.—Filed agreed statement of facts.

June 11, 1924.—Filed stipulation as to exhibits.

June 11, 1924.—Filed opinion (A. N. Hand, D. J.—3090).

June 11, 1924.—Report of commissioner confirmed. Exceptions overruled.

June 17, 1924.—Filed final decree and bill of costs for \$20,325.41.

July, 1924.—Filed notice of appeal.

July, 1924.—Filed assignments of error.

July, 1924.—Filed stipulation for intervenor's costs on appeal.

## IN UNITED STATES DISTRICT COURT

## LIBEL

The libel of the New York Dock Company against the steamship Poznan, her hull, engines, tackle, apparel and furniture and against her owners and all persons lawfully intervening for their interest in the said vessel, in a cause of contract and damage, civil and maritime, alleges and propounds upon information and belief as follows:

[fol. 4] First. At the times hereinafter mentioned, the libellant was and now is a corporation organized and existing under the laws of the State of New York, and in possession of certain wharf or wharves in the City of New York between Fulton Ferry, Fulton Street, Brooklyn, to the foot of Van Brunt Street, Brooklyn, and slips and enclosed waters adjacent to or connected with the same, said property abutting upon the waters of the Bay of New York, in the Port of New York, County of Kings and State of New York; and as such then and now is entitled to charge, collect and receive wharfage from all vessels lying at the said wharf or wharves, and also a fair and reasonable sum for the use and occupation of the said basin or basins or the waters belonging or adjacent thereto.

Second. That on or about the 1st day of December, 1920, the master of a certain vessel, known as the SS. Poznan or the person to whom the management of said vessel was entrusted, placed the said vessel at a wharf or wharves in said City of New York owned by the libellant; that said vessel remained at said wharf or wharves as aforesaid from the 1st day of December, 1920, until the 12th day of March, 1921, in all 101¼ days.

Third. That there became due for wharfage or the berthing of the aforesaid vessel and lighting and cleaning said wharf and there is now due to libellant and unpaid the aggregate sum of \$17,462.03 with interest, which sum is a fair, reasonable and customary charge in accordance with law.

Fourth. That your libellant has duly demanded payment of the sum of \$17,462.03 from the master or owner of the [fol. 5] said vessel, or the person to whom the management



was entrusted, but they have neglected or refused to pay the same or any part thereof, and the same is now due and unpaid.

Fifth. That the said vessel is now within the Port of New York and the Eastern District of New York.

Sixth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, this libellant prays that process in due form of law, according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the said SS. Poznan, her hull, tackle, apparel and furniture, and that the owners and all persons claiming any right, title or interest in said vessel may be cited to appear and answer upon oath all and singular the matters aforesaid, and that this Honorable Court will be pleased to decree to your libellant payment of the said sum of \$17,462.03 with interest and costs, and that the owners be condemned to pay the same; and that the said vessel, her hull, tackle, apparel and furniture may be condemned and sold to pay your libellant's demand, with costs and disbursements; and that your libellant may have such other and further relief as in the premises it may be entitled to receive.

Henry C. Field, Proctor for Libellant.

Office and P. O. Address, 44 Whitehall Street, New York City.

*Duly sworn to by William M. Mortimer. Jurat omitted in printing.*

[fol. 6] *Duly sworn to by William M. Mortimer. Jurat omitted in printing.*

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[fol. 7] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER PERMITTING INTERVENTION—April 17, 1922

An order having been granted herein upon the affidavit of George C. Sprague, verified the 18th day of March, 1922,

to show cause why the libellants in the consolidated action of Joseph H. Davis, et al., against the SS. Poznan, Acme Operating Corporation and Polish-American Navigation Corporation, should not be permitted to intervene herein and why the interlocutory decree entered herein should not be vacated and set aside and why they should not be permitted to defend and/or make any motion with relation to the libel herein, and a writ of venditione exponas having been signed and entered herein on the 21st day of March, 1922, and the execution of said writ having been stayed pending further order of this Court on the 24th day of [fol. 8] March, 1922, and this order to show cause upon the return date having been adjourned to the 31st day of March, 1922, and after hearing George C. Sprague, Esq., of counsel for intervening libellants in support thereof, and Ralph J. M. Bullock, Esq., of counsel, in opposition thereto;

Now, upon motion of Hunt, Hill & Betts, proctors for the libellants in the consolidated cause of Joseph H. Davis against the SS. Poznan, Acme Operating Corporation and the Polish American Navigation Corporation, it is hereby

Ordered, that the libellants in the consolidated action in this Court entitled Joseph H. Davis, et al., against the SS. Poznan, Acme Operating Corporation and Polish-American Navigation Corporation are hereby permitted to intervene in this action and the interlocutory decree and order of reference entered herein on the 1st day of August, 1921, and the writ of venditione exponas entered herein on the 21st day of March, 1922, be and the same hereby are vacated and set aside and the libellants in the said consolidated action are hereby permitted to answer, except, and/or make any motion with relation to the libel herein within ten days from the entry of this order in accordance with the terms of the decision rendered herein April 12, 1922.

Jno. C. Knox, U. S. D. J.

We hereby consent to the entry of the foregoing order without further notice to us.

— — —, Proctors for New York Dock Co. — —

— — —, Proctors for SS. Poznan.

[fol. 9]      IN UNITED STATES DISTRICT COURT

[Title omitted.]

NOTICE OF INTERVENTION OF JOHN B. HARRIS Co.

Please take notice that John B. Harris Company, one of the libellants in the consolidated cause in this Court, entitled Joseph H. Davis against the SS. Poznan, the Acme Operating Corporation and the Polish-American Navigation Corporation, hereby intervenes in this proceeding under the terms of the order of the Hon. John C. Know, D. J., filed herein on the 17th day of April, 1922, and that we are retained as its proctors.

Dated New York, April 15, 1922.

Yours, etc., Hunt, Hill & Betts, Proctors for Intervenor.

Office & P. O. Address, 120 Broadway, Borough of Manhattan, City of New York.

To Alexander Gilchrist, Jr., Esq., Clerk of the U. S. District Court.

To Bullowa & Bullowa, Esqs., Proctors for SS. Poznan, 32 Broadway, N. Y. C.

To Henry C. Field, Esq., 44 Whitehall Street, N. Y. C.

[fol. 10]      IN UNITED STATES DISTRICT COURT

[Title omitted.]

ANSWER OF INTERVENOR JOHN B. HARRIS Co.

The intervenor, John B. Harris Company, intervening by the order of this Court and answering the libel and complaint of the above named libellant in a cause of contract, civil and maritime, alleges as follows:

First. It denies any knowledge or information sufficient to form a belief as to each and every allegation of the article of the libel herein marked First.

Second. It denies each and every allegation of the article of the libel herein marked Second, except that it admits that the SS. Poznan was at the wharf of the libellant from the 1st day of December, 1920, until the 12th day of March, 1921.

Third. It denies each and every allegation of the article of the libel herein marked Third.

Fourth. It denies any knowledge or information sufficient [fol. 11] to form a belief as to each and every allegation of the article of the libel herein marked Fourth.

Fifth. It denies each and every allegation of the article of the libel herein marked Sixth except that it admits the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Further answering the allegations of the libel herein, this intervenor alleges :

Sixth. That the wharfage and other services mentioned in the libel herein were not furnished on the credit of the SS. Poznan nor arranged for with the master of the said vessel, but that the said wharfage and other services were furnished solely upon the request of and in accordance with an agreement entered into with and upon the credit of the Polish-American Navigation Corporation, claimant herein, and the said vessel is not responsible therefor.

Further answering the allegations of the libel herein, this intervenor alleges :

Seventh. That during the time during which the said wharfage and services are alleged in the libel to have been furnished the SS. Poznan, the said vessel was in the custody and care of the United States Marshal for the Southern District of New York, and being in "custodia legis" no maritime lien could arise or be enforced against the vessel for any services rendered the vessel during that time.

Wherefore, the intervenor prays for a decree of this Hon- [fol. 12] orable Court dismissing the libel with costs and all process herein and for such other and further relief as may be just.

Hunt, Hill & Betts, Proctors for Intervenor, John B. Harris Company.

Office and P. O. Address, 120 Broadway, Borough of Manhattan, New York City, N. Y.

*Duly sworn to by John B. Harris. Jurat omitted in printing.*

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

AGREED STATEMENT OF FACTS

In the above entitled cause the following facts are stipulated and agreed to:

1. New York Dock Company, the libellant herein, is, and at the times hereinafter mentioned was, a corporation duly organized and existing under the laws of the State of New York, having its principal office at 44 Whitehall Street, Borough of Manhattan, City of New York, in the Southern District of New York.

2. Polish-American Navigation Corporation is, and at the times hereinafter mentioned was, a corporation duly organized and existing under the laws of the State of Delaware, having its principal office as provided by the statutes of the State of Delaware, in the Dupont Building, Wilmington, Delaware, and, at the times hereinafter mentioned, maintained a principal office for the transaction of [fol. 14] business at 206 Broadway, Borough of Manhattan, City of New York, in the Southern District of New York, and was the owner of SS. Poznan, a vessel of 8,405.72 gross, 5,298 net and 11,250 dead weight tons registered at the Port of New York in the Southern District of New York, and engaged in ocean freight service.

3. Said New York Dock Company is, and at the times hereinafter mentioned was, the owner and in possession of a certain private pier known as Pier No. 6, situated on the Brooklyn shore of East River, which said pier was erected and shedded under license duly issued from the City of New York.

4. On or about November 30, 1920, New York Dock Company and Polish-American Navigation Corporation by C. J. Nevelson, Treasurer, entered into an agreement for the use of said Pier No. 6 by the said SS. Poznan to discharge, Polish-American Navigation Corporation agreeing to pay therefor \$250.00 per day, charge to commence from 7.00 A. M., December 1, 1920, and to continue up to the time the



steamer left and/or all cargo was removed, and agreeing to pay in addition thereto for lights at the rate of \$1.00 per light, per night or part thereof, for cleaning pier cost plus ten per cent, and for carting dirt \$2.50 per one horse load and \$1.30 for dump ticket when required, and \$5.00 per two horse load and \$2.15 for dump ticket when required.

5. Said agreement was not made with the master of SS. Poznan, which was at that time expected to arrive from Cuba, and which did arrive soon thereafter and was made [fol. 15] fast to said Pier No. 6 during the afternoon of December 2, 1920, under and pursuant to said agreement. Thereafter on December 2, 1920, said vessel was arrested and taken into possession by the United States Marshal for the Southern District of New York who allowed it to remain fast to said pier.

6. On December 7, 1920, A. M. Capen's Sons, Inc., filed a libel against "403 Bundles of Wrapping Paper and Acme Operating Corporation," said paper being part of the cargo on the S. S. Poznan. On the same day Hon. John C. Knox, U. S. D. J., granted an order to show cause after the hearing of which he signed the order, annexed hereto and made a part hereof marked Exhibit A, entered for the benefit of the consolidated libellants and under which they obtained their cargo back from the ship.

7. The cargo was completely discharged at 2 P. M. February 18, 1921; the delivery of the cargo from the pier was completed March 1, 1921. Said vessel remained fast to said pier to and including March 11, 1921, when it was moved to another pier, and the pier was cleaned and ready for the berthing of another vessel at midnight on March 12, 1921. Thereafter pursuant to the terms of said agreement New York Dock Company rendered its bill to Polish Navigation Corporation in the sum of \$25,333.33 for wharfage, together with \$805.00 for lights and \$323.70 for pier cleaning charges, carting dirt and dump tickets, a total of \$26,462.03.

8. On said indebtedness Polish-American Navigation Corporation paid New York Dock Company the following [fol. 16] sums on the dates stated:

|                   |            |
|-------------------|------------|
| December 27, 1920 | \$2,500 00 |
| January 15, 1921  | 2,500 00   |
| January 22, 1921  | 2,500 00   |
| February 9, 1921  | 1,500 00   |
| December 16, 1921 | 500 00     |
|                   | <hr/>      |
|                   | \$9,500 00 |

leaving a balance of principal unpaid amounting to \$16,962.03.

9. That the libel of the New York Dock Company was filed on the 9th day of April, 1921, after the filing of the majority of the libels filed by the libellants in the consolidated cause. This consolidated cause consisted of the suits for nondelivery of cargo shipped from New York and carried by the ship to Havana and back to New York without being discharged until the ship returned and unloaded the cargo in New York. This action was against the ship in rem and against the Acme Operating Corporation, charterer of the ship, and the Polish-American Navigation Corporation, the owner of the ship in personam and an interlocutory decree entered against all three. The ship has now been sold and there is now about two hundred and forty odd thousand dollars left in the Registry of the Court, being the proceeds of the sale. The libels in the consolidated cause claim damage in the amount of about \$1,700,000 and their actual provable damage will exceed the amount of money left in the Registry of the Court.

10. Said vessel was continuously in the custody of the Marshal from the time he took possession of it until it left said pier on March 11, 1921.

11. On January 6, 1921, New York Dock Company pre-[fol. 17] sented to the Marshal a bill for the wharfage and charges then due, accompanied by a letter of which the following is a copy:

“January 6, 1921.

U. S. Marshal, Southern District of New York, Post Office  
Building, New York City.

DEAR SIR:

Re Claim v. S S ‘Poznan’

We understand that the S S ‘Poznan,’ lying alongside of this Company’s Pier #6, Brooklyn, now is and since the beginning of the month of December, 1920, has been under your custody. As owner of Pier #6 and in accordance with agreement entered into by this Company with Polish-American Navigation Corporation with reference to the S S ‘Poznan,’ we enclose bills covering steamer wharfage, light charges and pier cleaning totaling \$7,000.00. You will note that these bills represent charges against the S S ‘Poznan’ to the date of this letter.

We would be obliged if you would give your immediate attention to the payment of the enclosed bills. In case there is any question as to your liability in this matter we would appreciate your immediately advising us to that effect.

You, of course, are aware that the steamer wharfage and light charges are continuing to accrue and will accrue until S S ‘Poznan’ is removed, or the pier cleared of its cargo, whichever event occurs last.

We are,

Very truly yours, (Signed) C. D. Hoagland, Vice-  
President.”

AEM.

[fol. 18] 12. On January 7, 1921, New York Dock Company wrote the Marshal another letter of which the following is a copy:

“January 7, 1921.

United States Marshal, Southern District of New York,  
Post Office Building, New York City.

GENTLEMEN:

Re Claim v. S S ‘Poznan’

Kindly refer to this Company’s letter addressed to you under date of yesterday, the 6th inst., relating to claim against the ‘Poznan’ for steamer wharfage, light charges and pier cleaning aggregating \$7,000.00 as of January 6, 1921.

We understand that your office does not question your liability for steamer wharfage, light charges and pier cleaning charges but that you have raised the question of the amount charged in this matter for steamer wharfage. We apprehend that you are not aware of the fact that included in our steamer wharfage charge is the use of this Company's Pier #6 for discharging and storing cargo. In other words the steamer wharfage charge does not cover merely the right to make fast at the pier and discharge over the side to lighters. The charge as billed is in accordance with this Company's regular tariffs and we can in no way agree with your contention that the amount of the charge is improper.

However, should you upon further investigation de-[fol. 19] termine that the rates as charged are not satisfactory to you, we hereby demand that you immediately proceed to remove the S/S 'Poznan' from our property.

You appreciate that there has been great delay with reference to the collection of the charges due and we respectfully request therefor that you give this matter preferred attention.

We are

Yours very truly, (Signed) Henry C. Field, Legal Department."

HCF. AEM.

13. On or about January 7, 1921, New York Dock Company received from the Marshal a reply of which the following is a copy:

"Department of Justice, Office of the United States Marshal, Southern District of New York, United States Court House, Room 307, Third Floor.

New York, January 7, 1921.

New York Dock Co., Legal Department, #44 Whitehall Street, New York, N. Y.

GENTLEMEN:

In re Claim of S/S Poznan

I am in receipt of your letters of January 6th and 7th, in reference to charge for wharfage, cleaning and light, amounting to in the aggregate \$7,000.00.

[fol. 20] The Marshal does not and will not assume liability for any charges against this vessel, until so directed by order of the court.

I desire to call your attention to the application hitherto made on January 5th, for an order 'directing the Polish-American Navigation Company to move on the 6th day of January, 1921, after working hours of that day the S S Poznan, from Pier 6, Brooklyn, N. Y., where the said steamship is now lying'—by an order entered on January 6th, 1921, Judge Augustus N. Hand denied this motion with leave to renew after eight (8) days.

Respectfully, (Signed) Thomas D. McCarthy, United States Marshal."

14. On or about December 9, 1921, the New York Dock Company and the Polish-American Navigation Corporation entered into the agreement set forth in the two letters, copies of which are hereto annexed and made a part hereof, marked Exhibits B and B-1, and the first payment of \$500 was made on December 16th, 1921, as shown above, but no further payment was made under said agreement.

15. The New York Dock Company accepted payments from the Polish-American Navigation Corporation as hereinbefore stated after the letters set forth above were written to the U. S. Marshal, as appears in the portions of the Marshal's bill of costs hereto annexed, marked Exhibit C. [fol. 21] The New York Dock Company requested the U. S. Marshal to include its said claim as part of the bill of costs submitted by the Marshal which was done by the Marshal. Upon objection made by the libellants in the consolidated cause, this item was struck out by the U. S. District Court Clerk which action was later confirmed by the Court without prejudice to the right of the New York Dock Company to claim against the proceeds of the vessel, as appears in the order of this Court, dated June 6, 1922, annexed hereto and marked Exhibit D.

16. Upon motion made by the libellants in the consolidated cause they were allowed to intervene in the libel suit brought by the New York Dock Company against the SS. Poznan and thereafter filed exceptive allegations to the said libel of the New York Dock Company which were overruled by the Court with leave to the libellants to make



answer which answer has since been filed. On or about the 18th day of May, 1922, the U. S. Marshal, Thomas D. McCarthy, then in office, and his chief deputy made the affidavits attached hereto and marked Exhibits E and F.

17. New York Dock Company filed no notice claiming lien against said vessel in the manner provided by Sections 80 and 82 of the Lien Law of the State of New York.

18. The Polish-American Navigation Corporation has now very little, if any, property in addition to whatever equity there may be in the proceeds of the sale of the SS. Poznan and is now practically insolvent.

19. The parties hereto reserve the right to prove any [fol. 22] additional fact other than those above stipulated and agreed to, which they or the Commissioner or the Court hearing the cause may deem necessary or proper.

New York Dock Company, by V. A. Wheeler, Treasurer. John B. Harris Co., John B. Harris Company, Intervenor, by John B. Harris, President. Davies, Auerbach & Cornell, Proctors for Libellant. Hunt, Hill & Betts, Proctors for John B. Harris Company and various other libellants.

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[fol. 23] EXHIBIT A TO AGREED STATEMENT OF FACTS

AT A STATED TERM OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, HELD IN THE COURT-ROOMS, 12TH FLOOR OF THE WOOLWORTH BUILDING, BOROUGH OF MANHATTAN, NEW YORK CITY, ON THE 11TH DAY OF DECEMBER, 1920.

Present: Hon. John C. Knox, D. J.

A. M. CAPEN'S SONS, INC., Libellant,  
against

403 BUNDLES OF WRAPPING PAPER and ACME OPERATING CORPORATION, Respondents

An order to show cause having been granted on December 7, 1920, by me upon the affidavit of George C. Sprague, Esq., and James F. Capen, both verified De-

ember 7, 1920, and on the libel herein, directing the respondent Acme Operating Corporation to show cause on the 8th day of December, 1920, at 2 P. M., before me, why an order should not be entered herein granting the possession of the said 403 bundles of wrapping paper numbered 1 to 403, inclusive, marked

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: 7 6 4 :

---

: A M C :

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Havanna

[foi. 24] filed, to the libellant, upon furnishing to the respondent a surety bond in the amount claimed by the respondent for freight on said consignment of paper for its return from Havana, Cuba, to New York, N. Y., and the return of said order having been adjourned from December 8, 1920, to December 9, 1920, at 2 P. M., upon the consent of proctors for libellant and respondent Acme Operating Corporation, and said order having come on before me to be heard on the 9th day of December, 1920, at 2 P. M., and George C. Sprague, Esq., of counsel for libellant, having been heard in support of said motion and Frank E. Welch, Esq., of counsel for respondent Acme Operating Corporation, and Lawrence Brown, Esq., of counsel for the SS. Poznan having been heard in opposition thereto, and after reading and filing the affidavit of Bartholemew L. Stafford, verified December 9, 1920, and due deliberation having been had thereon;

Now, upon motion of Hunt, Hill & Betts, proctors for the libellant, and upon all the papers and proceedings had herein, it is

Ordered, that the respondent, Acme Operating Corporation, deliver to the libellant herein the said 403 bundles of wrapping paper numbered 1 to 403, inclusive, marked

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: 7 6 4 :

---

: A M C :

---

Havanna

New York to Havana, Cuba, during the month of September [fol. 25] ber, 1920, which shipment was not delivered by the

Poznan at Havana but was returned on board said vessel to New York, where it is now being discharged, upon libellant's surrender to the respondent Acme Operating Corporation of one of the original set of the bills of lading covering said shipment, endorsed by the consignor or consignee named therein, together with the filing in this court of a bond with good and sufficient sureties for the payment of freight charges alleged to be due to the respondent, Acme Operating Corporation and/or Polish American Navigation Corporation, for return of said shipment from Havana to New York, said bond to be in the amount claimed by the said Acme Operating Corporation to be due for said return freight and to bind the libellant and its surety to pay to the respondent Acme Operating Corporation and/or Polish American Navigation Corporation such sum, if any, which this Court may determine is due to the said Acme Operating Corporation and/or Polish American Navigation Corporation for return freight on the said shipment from Havana to New York; and it is

Further ordered, that in lieu of delivery of the said bills of lading endorsed as aforesaid, libellant may deposit in this court its bond with good and sufficient surety in the amount of the invoice value of the goods, undertaking to hold the respondent Acme Operating Corporation, the SS. Poznan and the Polish American Navigating Corporation, as owner of the SS. Poznan, harmless from any judgment which may be secured against the said SS. Poznan, the Acme Operating Corporation and/or the Polish American [fol. 26] Navigation Corporation, by reason of its delivery of said shipment to the libellant without libellant's surrender of the said bill of lading; and it is

Further ordered, that any shipper of goods on the SS. Poznan on her voyage from New York to Havana, beginning about October 1st, 1920, whose goods were not delivered at Havana by the SS. Poznan but were returned on said vessel to New York, may have the benefit of the provisions of this order, and may obtain its shipment of goods as herein provided by delivery of its said bill of lading as aforesaid to the respondent Acme Operating Corporation, properly endorsed as aforesaid, and upon filing such security as above set forth with the clerk of this court, and that thereupon such shipper or shippers shall be deemed to have appeared and intervened in this proceeding and

to have claimed possession of his or its cargo without the necessity of formal pleading. Any bonds given in pursuance of this order shall particularly identify the bill of lading by number; and it is

Further ordered, that the delivery of bills of lading and the giving of bonds pursuant hereto shall be without prejudice to the rights of all parties in all respects.

Jno. C. Knox, U. S. D. J.

[fol. 27] EXHIBIT B TO AGREED STATEMENT OF FACTS

(Copy)

New York Dock Railway, Warehouses, Piers, Terminals,  
Manufacturing Buildings, Cold Storage

New York, December 8, 1921.

Polish American Nav. Corporation, 206 Broadway, New  
York, N. Y.

GENTLEMEN:

Attention of Mr. L. E. Swartz, Comptroller

Re Charges against S/S "Poznan"

This is to confirm agreement between our companies with regard to the outstanding charges against the S/S "Poznan," which charges are referred to in a libel filed by this Company against the "Poznan."

New York Dock Company's rights with regard to the libel filed against the "Poznan" are not to be prejudiced in any way or in any way affected by this agreement. New York Dock Company, however, gives you an assurance that as long as the terms of this agreement are complied with on the part of your Company it will refrain from pressing its claim for the sale of the "Poznan" under the libel; it being distinctly understood, however, that all charges are to be paid before the "Poznan" is released from libel by New York Dock Company.

Polish American Nav. Corporation agrees to make pay-[fol. 28] ment of its indebtedness totaling \$17,468.03, plus

\$600.00 being compromise settlement of interest on this account, actual interest being figured at the sum of \$1,147.52, by the following installment payments and following dates:

\$500.00 on or before December 15, 1921.  
 1,000.00 on or before January 1, 1922.  
 1,000.00 on or before January 15, 1922.  
 1,000.00 on or before February 1, 1922.  
 1,000.00 on or before February 15, 1922.  
 1,500.00 on or before March 1, 1922.  
 1,500.00 on or before March 15, 1922.  
 1,500.00 on or before April 1, 1922.  
 1,500.00 on or before April 15, 1922.  
 2,000.00 on or before May 1, 1922.  
 2,000.00 on or before May 15, 1922.  
 2,000.00 on or before June 1, 1922.  
 1,568.03 on or before June 15, 1922.

We would be obliged if you would advise us in writing that this letter correctly states the understanding between our Companies and if you would at the same time forward us your check in the sum of \$500.00 in accordance with the agreement.

We are,

Yours very truly, (Sd.) V. A. Wheeler, Treasurer.

HCF. AFM.

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[fol. 29] EXHIBIT B-1 TO AGREED STATEMENT OF FACTS

(Copy)

Polish American Navigation Corporation, 206 Broadway,  
 New York

December 9th, 1921.

New York Dock Company, 44 Whitehall Street, New York  
 City.

GENTLEMEN:

Attention of Mr. Field.

We have your letter of the 8th inst., relative to your claim against our Company amounting to \$17,468.03 plus



interest in the amount of \$600.00, totalling \$18,068.92. The method of payment as set forth in your letter is in accordance with our understanding and has our approval.

You will receive the initial payment of \$500.00 on or before December 15th as agreed.

Very truly yours, Polish American Navigation Corp., by L. E. Swartz.

LES-PCL.

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[fol. 30] EXHIBIT C TO AGREED STATEMENT OF FACTS

United States District Court for the Southern District of New York

JOSEPH H. DAVIS

against

Steamship "POZNAN," Her Engines, etc.

Marshal's Costs

Hunt, Hill & Betts, Proctors for Libellant.

William C. Hecht, U. S. Marshal.

Commission on Disbursements: On \$34,688.92 at 2 per cent, \$693.78.

Disbursements:

|  |             |
|--|-------------|
| Advertising, Expenses of seizure, — days' custody, Wharfage, Towing, Pumping, Advertising sale, Printing posters | \$34,688 92 |
| Serving venditioni exponas, Mileage, 10 miles @ 6c. a mile   | .60         |
| Fee for advertising  |             |
| Commission on sales, viz:  |             |
| On \$500.00 at 2½ per cent   | 12 50       |
| On \$252,500.00 @ 1¼%  | 3,156 25    |
|  | <hr/>       |
|  | \$38,552 05 |
| [fol. 31] Bill of Sale, drawing and Executing  | 5 00        |
| 94 Actions, Monition fees and expenses   | 760 50      |
|  | <hr/>       |
|  | \$39,317 55 |

## Remarks:

Attached December 2, 1920.

Discharged April 20, 1922.

Sold April 20, 1922.

For \$253,000.00 and \$5.00 for a Bill of Sale to Luckenbach Steamship Co., of No. 44 Whitehall Str., New York City, N. Y.

April 25, 1922.—Proceeds of Sale, \$253,000.00, and \$5.00 for a Bill of Sale, Total, \$253,005.00.

Paid to Clerk U. S. Dist. Court, S. D. N. Y.

Taxed at 17,972.14 Dollars.

Alex. Gilchrist, Jr., Clerk.

Dated New York May 10, 1922.

|  |           |
|--|-----------|
| Sam Youngerman, Keeper from December 2, 1920 to March 31, 1921, noon, 119½ days @ \$5.00 a day .....                   | \$597 50  |
| Giacinto Nancinella, Keeper from April 1, 1921 to November 18, 1921 noon, 231½ days @ \$5.00 a day .....               | 1,187 50  |
| Philip Doblin, Keeper from November 18, 1921 noon to February 18, 1922, 92½ days @ \$5.00 a day .....                  | 462 50    |
| Charles Kolarek, Keeper from February 18, 1922 to April 20, 1922, 61 days @ \$5.00 a day .....                         | 305 00    |
| [fol. 32] New York Evening Post, publishing notice of sale, April 7, 1922 .....  | 34 20     |
| Tenny Press, printing 500 posters, April 7, 1922 .....   | 14 00     |
| New York Evening Post, publishing Notice of Sale, April 20, 1922 .....   | 17 10     |
| Tenny Press, printing 500 posters, April 20, 1922 .....  | 14 00     |
| Department of Docks, City of New York, Wharfage from March 11, 1921 to April 20, 1922—406 days @ \$29.49 per day ..... | 11,972 94 |

New York Dock Company, Wharfage other charges as follows:

|   |            |                  |
|---|------------|------------------|
| Partial billing Steamer Wharfage S/S Poznan,<br>Pier 6, from Dec. 1, 1920, 7:00 A. M. to Jan.<br>14, 1921, 7:00 A. M. (44 days at the rate of<br>\$250.00 per day pro rata) |            | \$11,000 00      |
| 12/27/20 pd. on acct  | \$2,500 00 |                  |
| 1/15/21 do.   | 2,500 00   |                  |
| 1/22/21 do.   | 2,500 00   |                  |
| 2/ 9/21 do.   | 1,500 00   |                  |
| 12/16/21 do.  | 300 00     |                  |
|   | <hr/>      | 9,300 00         |
| Balance due   |            | <hr/> \$1,700 00 |

|  |  |          |
|--|--|----------|
| Additional billing Steamer Wharfage S/S Poz-<br>nan—Pier 6 from January 14, 1921—7:00<br>A. M. to January 31, 1921, midnight (17<br>days—17 hours) at the rate of \$250.00 per<br>day—pro rata |  | 4,427 08 |
| From January 31, 1921 midnight to March 12,<br>1921, 3 P. M. (39 days—15 hours) at the rate<br>of \$250.00 per day—pro rata  |  | 9,908 25 |
| [fol. 33] Light charges from Dec. 1, 1920, to<br>Mar. 12, 1921—805 lights at the rate of \$1.00<br>per light   |  | 805 00   |

Pier Cleaning charges:

|                          |         |        |
|--------------------------|---------|--------|
| Cost plus 10%            | \$68 50 |        |
| 78 single loads @ \$2.50 | 195 00  |        |
| 11 double loads @ 5.00   | 55 00   |        |
| 4 dump tickets @ 1.30    | 5 20    |        |
|                          | <hr/>   | 323 70 |

(With Interest.)

|                                  |             |
|----------------------------------|-------------|
| Total Wharfage and other charges | \$16,962 03 |
|----------------------------------|-------------|

|                        |             |
|------------------------|-------------|
| Amount Carried Forward | \$31,536 77 |
|------------------------|-------------|

|  |          |
|--|----------|
| Charles Shongood, Auctioneer, Commission on<br>\$253,000.00 @ 1%   | 2,530 00 |
| Edward A. Hart, Captain of Ship from March<br>1, 1922 to April 20, 1922, 51 days @ \$5.00 a<br>day (Services rendered as per authority of<br>Hon. Learned Hand, U. S. D. J.) | 255 00   |

|  |        |
|--|--------|
| Bolestau Kuzmiuski, Mate of Ship from March 1, 1922 to April 20, 1922, 51 days @ \$3.00 a day (Services rendered as per authority of Hon. Learned Hand, U. S. D. J.) ..... | 153 00 |
| James C. Webster, expenses incurred in connection with the sale by the Marshal of the S/S Poznan as follows:   |        |

To Advertising:

New York Herald:

April 2nd ..... \$28 00

April 19th ..... 25 00

Journal of Commerce:

April 6th ..... 48 75

April 12th ..... 37 50

Marine News, April 2nd ..... 37 50

[fol. 34] To printing 500 copies of report of survey of Frank S. Martin, Esq.:

The Hecla Press, March 30th ..... 30 00

To Stenography:

Miss Charlotte Riegger, Stenographer, Addressing envelopes ..... 10 65

Stationery ..... 6 25

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|                                     |        |
|-------------------------------------|--------|
| Total Expenses of Mr. Webster ..... | 214 15 |
|-------------------------------------|--------|

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|                           |             |
|---------------------------|-------------|
| Total Disbursements ..... | \$34,688 92 |
|---------------------------|-------------|

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EXHIBIT D TO AGREED STATEMENT OF FACTS

United States District Court, Southern District of New York

JOSEPH H. DAVIS, Libellant,  
against

S. S. "POZNAN," ACME OPERATING CORPORATION, and POLISH  
AMERICAN NAVIGATION CORPORATION, Respondents

Pursuant to a notice served on the interested proctors for the libellants in the above consolidated cause and proc-

tors for other libellants by William C. Hecht, United States Marshal for the Southern District of New York for the taxation of the bill of his costs and disbursements and the [fol. 35] taxation being had pursuant to such notice before the Clerk of the United States District Court for the Southern District of New York on the 10th day of May, 1922, the item of \$16,962.03 included in the Marshal's bill of cost as claimed by the New York Dock Company for wharfage of the S. S. Poznan being objected to on the grounds that the Marshal had made no arrangement with the New York Dock Company for such wharfage, but that the arrangement had been made with the ship's owners, the Polish American Navigation Company by the New York Dock Company which had accepted payment on account from the owners and the owners' bills, and not due, for the balance of its bill, and also because the bill included charges for storage of cargo, pier-lights, cleaning, etc., and was for an amount far in excess of the rates provided by the New York Charter, at which rate the payments already made as stated in the bill of costs would more than cover any amount due from the Marshal for such wharfage, and these objections having been sustained by the Clerk after hearing the facts from the Chief Deputy Marshal, and excepted to by the proctors for the New York Dock Company, and the bill of costs being further objected to by C. E. Menzel, Esq., appearing for the Mediterranean Stevedoring Company for the reason that the balance due for stevedoring charges of the said Company for unloading the S. S. Poznan amounting to \$27,500 were not included in the said bill of costs, and it appearing that no contract for stevedoring was made by the Marshal for discharging the cargo and that the Marshal had nothing to do with the cargo except the attachment of 302 bales of paper which had been bonded and removed within 48 hours after the attachment, the objection was overruled by the Clerk and an exception [fol. 36] taken and a hearing of an appeal from the taxation of the aforesaid bill of costs having been noticed before Judge Hand and the said hearing adjourned to the 31st day of May, 1922, coming on to be heard on that day and Charles E. Hotchkiss, Esq., of counsel for Henry C. Field, proctor for the New York Dock Company, in support of the appeal and exception to the taxation of the bill of

costs as made by the Clerk, having stated that the original contract for wharfage was made by the New York Dock Company with the Polish American Navigation Corporation, the owners of the SS. Poznan and having read two letters, dated January 6th and 7th, 1921, addressed by the New York Dock Company to the United States Marshal, the first advising the Marshal of the rate charged the Polish American Navigation Corporation for the wharfage of the ship and cargo and that unless the SS. Poznan were moved it would seek to hold the Marshal responsible for wharfage, and the second explaining the nature of the charges as being for storing cargo on the pier, lights, cleaning, etc., and a third letter addressed by the United States Marshal to the New York Dock Company, dated January 7, 1921, to the effect that the Marshal would accept no responsibility for the payment of such wharfage without an order of the Court and after hearing the facts from the Marshal; and G. E. Menzel, Esq., having been heard in support of the appeal from an exception to the taxation of said bill of costs taken by the Mediterranean Stevedoring Company, Inc., because it did not include the balance due on the bill of Mediterranean Stevedoring Company, Inc., for discharging the SS. Poznan and which the United States District Court Clerk had refused to tax; and having stated that the Stevedoring Company extended credit to the ship and its owners [fol. 37] but understood that they were discharging the cargo of the SS. Poznan under the direction of the Court and that the Stevedoring Company assumed that they were paid for their work so done, and that it was entitled to be paid on equitable grounds, and after hearing the facts from the present Chief Deputy Marshal, who stated that he was in charge of the Poznan matter in the Marshal's office and had never made any arrangement with either the New York Dock Company for wharfage of the ship or for stevedoring or unloading the ship, and that he understood that the former Marshal, Thomas D. McCarthy and former Chief Deputy Marshal, Joseph P. McDunnough each had made an affidavit to the effect that neither of them during George Whitefield Betts, Jr., Esq., of counsel for various libellants in the consolidated cause in opposition thereto,

Now, on motion of Hunt, Hill & Betts, proctors for various libellants in the above consolidated cause, it is hereby

Ordered, that the taxation of the Marshal's bill of costs and fees herein by the Clerk of this court and his action in striking out the item of \$16,962.03 claimed for wharfage and refusing to tax the bill of the Mediterranean Stevedoring Company for unloading, be and the same hereby are affirmed, and the said exceptions to and appeals from said taxation are hereby overruled and dismissed, without prejudice to any rights of the New York Dock Company to have recourse against the proceeds if any such right there be.

Learned Hand, U. S. D. J.

June 6th, 1922.

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[fol. 38] EXHIBIT E TO AGREED STATEMENT OF FACTS

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF  
NEW YORK

JOSEPH H. DAVIS, Libellant,  
against

SS. "POZNAN," ACME OPERATING CORPORATION, and POLISH  
AMERICAN NAVIGATION CORPORATION, Respondents

CITY, COUNTY AND SOUTHERN DISTRICT OF NEW YORK, ss:

Thomas D. McCarthy, being duly sworn, deposes and says, that he was formerly the United States Marshal for the Southern District of New York and was such from March 15, 1915 to Nov. 1, 1921; that during the time when he occupied the said position as United States Marshal for the Southern District of New York, the SS. Poznan was taken into custody by him through his deputies; that at no time, to my knowledge and belief, while holding such position did he enter into any agreement with the New York Dock Company or make any request to have the SS. Poznan moored at any of its piers nor did he agree to pay for any such wharfage, nor did he authorize any of his deputies to make such an agreement or pay for such wharfage.

That during the time that he was such Marshal he did not at any time, to my knowledge and belief, direct the

master of the said vessel to berth his ship at any pier belonging to the New York Dock Company, nor did he au-  
[fol. 39] thorize any of his deputies so to do.

Thomas D. McCarthy.

Sworn to before me this 18th day of May, 1922.

Walter A. Peterson, Notary Public, Richmond  
County, No. 632. Certificate filed in New York  
County No. 397. N. Y. County Register No. 3294.  
Commission expires March 30, 1923. (Seal.)

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EXHIBIT F TO AGREED STATEMENT OF FACTS

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW  
YORK

JOSEPH H. DAVIS, Libellant,

against

S. S. "POZNAN," ACME OPERATING CORPORATION, and POLISH  
AMERICAN NAVIGATION CORPORATION, Respondents

CITY, COUNTY, AND SOUTHERN DISTRICT OF NEW YORK, ss:

Joseph P. McDonnough, being duly sworn, deposes and says: that he was formerly chief deputy in the office of the United States Marshal for the Southern District of New York and was such until Nov. 15, 1921; that during the time he occupied such position as chief deputy marshal, he was [fol. 40] in charge of the matter of the SS. Poznan and personally supervised the service of all the munitions, the custody of the vessel under the Marshal for the Southern District of New York and all matters connected with the said vessel which concerned the Marshal's office.

That in the course of his said duties as chief deputy-marshal, he never at any time in behalf of the Marshal for the Southern District of New York, entered into any agreement with the New York Dock Company to have the SS. Poznan moored at any of its piers, nor did he agree to pay the New York Dock Company for any such wharfage for the said vessel, nor did he direct the master or those in charge of the said vessel to berth the ship at any pier be-



longing to the New York Dock Company, nor did he ever request the New York Dock Company to furnish wharfage to the said vessel.

That all communications received from the New York Dock Company are on file in the Marshal's office and all communications sent by him to the New York Dock Company, if any, are in the letter book in the office of the Marshal for the Southern District of New York.

Joseph P. McDonnough.

Sworn to before me this — day of May, 1922. Leo C. Fennelly, Notary Public, Kings Co., No. 244. Kings Co. Reg. No. 3054. Cert. filed in N. Y. Co. N. Y. Co. Clk's No. —, Reg. —. Commission expires March 30, 1923.

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[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

It is hereby stipulated and agreed that on January 5, 1921, Judge Augustus N. Hand signed two orders in the case of A. M. Capen's Sons, Inc., Libellant, against 403 Bundles of Wrapping Paper and Acme Operating Corporation, Respondents, then pending in the United States District Court for the Southern District of New York, true copies of which are hereto annexed and marked Exhibit G and Exhibit H respectively.

It is further stipulated and agreed that this stipulation and the said exhibits may be annexed to and form a part of the Agreed Statement of Facts heretofore signed herein.

Dated New York City, January 20, 1923.

New York Dock Company, by V. A. Whulin, Treasurer. John B. Harris Company, by John B. Harris, President, Intervenor. Hunt, Hill & Betts, Proctors for John B. Harris Co. and other Libellants. Davies, Auerbach & Cornell, Proctors for Libellant.

[fol. 42] EXHIBIT G TO ADDITIONAL AGREED STATEMENT OF  
FACTS

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW  
YORK

A. M. CAPEN'S SONS, INC., Libellant,  
against

403 BUNDLES OF WRAPPING PAPER and ACME OPERATING COR-  
PORATION

Order to Show Cause

Upon reading and filing the annexed affidavit of Bartholomew L. Stafford, verified January 4, 1921, and C. E. Ferguson, verified January 4, 1921, and Matthew Delfino, verified January 4, 1921, and on all the proceedings herein, it is ordered that the Polish American Navigation Corporation, owners of the SS. Poznan and all intervening libellants herein, show cause on the 5th day of January, 1921, at 3:30 o'clock in the afternoon of said day in Chambers in the Woolworth Building why an order should not be entered herein directing the Polish American Navigation Corporation to move on the 6th day of January, 1921, after working hours of that day the SS. Poznan from Pier 6, Brooklyn, N. Y., where the said steamship is now laying, to another pier whereat the said steamship Poznan can properly and expeditiously discharge, and further directing said Polish American Navigation Corporation to employ 12 gangs of stevedores in unloading said this order upon Bullowa & Bullowa, proctors for the Polish [fol. 43] American Navigation Corporation at their office No. 32 Broadway, and upon the proctors of all the intervening libellants herein at their respective offices as designated in the last papers served by them herein on the 5th day of January, 1921, shall be sufficient.

Augustus N. Hand, U. S. D. J.

Dated New York, January 5th, 1921.

This was not served until 12:45 on January 5, 1921.

Bullowa & Bullowa, Proctors for Polish-American  
Navigation Corp., Haight, Sanford, Smith &  
Griffin.

This was not served until 1:20 P. M. on Jan. 5/21.

Duncan & Mount.

Copy received at 1:40 P. M. Jan. 5/21.

Hunt, Hill & Betts.

[fol. 44]                      EXHIBIT TO EXHIBIT "G"

Affidavit of Bartholomew L. Stafford

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF  
NEW YORK

A. M. CAPEN'S SONS, INC., Libellant,  
against

403 BUNDLES OF WRAPPING PAPER AND ACME OPERATING  
CORPORATION, Respondents

STATE OF NEW YORK,  
County of New York,  
Southern District of New York, ss:

Bartholomew L. Stafford, being duly sworn, deposes and says:

That he resides in Leonia, Bergen County, State of New Jersey, and is President of the Acme Operating Corporation, respondent herein.

The SS. Poznan, owned by the Polish American Navigation Corporation, and under charter to the said Acme Operating Corporation, arrived in the Port of New York on its return trip from Havana, Cuba, on or about the 30th day of November, 1920. That on her arrival she had approximately eight thousand two hundred eight (8,208) tons dead weight cargo on board. She was docked at Pier 6, Brooklyn, where she has since been laying.

That the SS. Poznan was chartered to the respondent herein, by the said owners under a Charter Party dated [fol. 45] the 6th day of September, 1920, which Charter Party deponent respectfully refers to with the same force and effect as if the same was set forth in full herein, and among other things said Charter Party provides that the charterers shall pay for the use and hire of said vessel the

sum of Sixty-seven thousand five hundred (\$67,500) Dollars per calendar month, or approximately Two thousand three hundred (\$2,300) Dollars per day, and since the arrival in this port and docking at Pier 6, which was over a month ago the Poznan has discharged from her approximately one-half ( $\frac{1}{2}$ ) her cargo, which amounts approximately to four thousand (4,000) dead weight tons, and that ordinarily in the due course of business with the proper use of diligence and attention this whole cargo should be discharged in nine (9) days; deponent respectfully refers to affidavit of Matthew Delfino hereto annexed.

That in this time there has accrued as charter hire (should the Charter Party still be in effect) over Sixty-seven thousand five hundred (\$67,500) Dollars, whereas had the cargo been discharged properly in nine (9) days there would accrue under the same circumstances the sum of approximately Eleven thousand seven hundred (\$11,700) —. The reason why it has taken so long to discharge one-half ( $\frac{1}{2}$ ) of this cargo is that the owners have employed on an average of no more than two gangs to do this work whereas the ship is of such size as to accommodate upwards of ten gangs of men to do this work. This was done notwithstanding the demand made upon the owners by deponent to carry out the discharge of this cargo as expeditiously as possible as is shown by the demand made in the following Letters:

“December 2, 1920.

[fol. 46]

Polish American Navigation Corp., 206 Broadway, New York.

GENTLEMEN: Confirming conversation had between your Mr. Nevilson and Mr. Welch last night, we would say that we are desirous of having you unload the Poznan as expeditiously as possible and charge the expenses of such unloading and the time so consumed to our firm, it being understood of course that these goods are not to be delivered to the shippers until payment has been had and charges assessed for the return of the goods on the boat to this port.

We would appreciate it if you will have the Captain of

the boat report to us as the Charter-s of the boat, so that we may have an opportunity to get his report.

Yours very truly, Acme Operating Corporation, by  
(Signed) Bartholomew L. Stafford, President.

By hand Dec. 2, 1920."

"December 13, 1920.

The Polish American Navigation Co., 206 Broadway, New  
York City.

Attention of Mr. Charles Nevilson

GENTLEMEN: In view of the slow unloading of the S. S. Poznan and the extremely high charges on same, we think [fol. 47] it best for the interest of all parties, that the cargo should be discharged into barges as well as on the wharf so as to relieve the ship from further charter hire.

We are ordering barges down to be ready to unload tomorrow morning. Please work all possible hatches and discharge this vessel, putting goods both on the wharf and in the barges simultaneously, as the vessel is equipped with nineteen derricks and booms. This method of unloading should complete the cargo in three days and stop the charter hire.

The barge expenses being only a small fraction of the charter money, it is to the best interest that this should be done.

Please be advised accordingly.

Yours very truly, Acme Operating Corporation, by  
(Signed) Bartholomew L. Stafford, President."

Deponent is informed and verily believes that at present the dock is so congested that it is impossible to work more than one gang of stevedores to discharge the SS. Poznan and this has been offered by the owners of the vessel as an excuse for their tardiness in unloading.

That on the 4th day of January, 1921, a demand was made on the respondent herein by the said owners, Polish American Navigation Corporation for sufficient coal to run the boat for a period of two (2) weeks.

That the deponent had demanded the Polish American Navigation Corporation to take such steps as may be neces-

sary to move the Poznan from Pier 6, where she now lays [fol. 48] to an empty pier whereat the discharging may be completed as expeditiously as possible. This demand has been refused.

Deponent further states that an empty dock in the immediate vicinity of Pier 6, Brooklyn, and within the same District, can be procured immediately. That the Poznan can be moved there after completion of a working day, within a very short period of time and at a nominal cost of less than \$200.

Deponent respectfully refers to an assignment made the 8th day of September, 1920, to the Polish American Navigation Corporation, wherein all freight moneys up to the sum of Two hundred seventy-five thousand (\$275,000) Dollars is assigned to the Polish American Navigation Corporation on account of moneys to become due the Polish American Navigation Corporation by reason of certain charters and further by reason of stevedore charges and for cost of coal to be placed on the S. S. Poznan pursuant to the terms set forth in the Charter Party, dated September 6, 1920, hereinbefore referred to.

That the action of the owners in refusing to do anything within their means to expedite the discharging of this cargo indicates to the deponent, and the deponent verily believes that the Polish American Navigation Corporation intends to keep the boat at this pier so that they shall have a claim against the respondent, the Charters of said boat, on account of charter hire in an amount far in excess of the moneys which might be collected for freight. That at the rate of discharging as now being carried out, deponent is informed and verily believes that it will take upwards of three (3) weeks' time which represents an outlay of approximately Two thousand three hundred (\$2,300) Dollars [fol. 49] daily; that if the boat was moved to another pier and unloaded in four (4) days by the proper use of stevedores.

For this time the owners could claim for charter hire only in the sum of approximately Nine thousand two hundred (\$9,200) Dollars, whereas if the boat was kept at Pier 6, and three (3) weeks' more time taken to unload the remaining cargo the owners will make a claim of approximately Fifty thousand three hundred (\$50,300) Dollars.

Deponent made another demand eight (8) days ago in a telephone conversation had with Charles Nevilson, Freight Manager of the Polish American Navigation Corporation, to move the Poznan from Pier 6 to another dock. In this conversation Mr. Nevilson stated that the boat would be completely discharged within a period of a few days, since which time the deponent is informed and verily believes very little progress in the way of discharging has been made, and deponent is further informed and verily believes that there is but only one gang of stevedores being used in discharging.

The deponent considers it is for the best interest of all concerned that the Poznan should be moved to a pier where the discharging of her cargo could be expeditiously carried out.

Wherefore, Deponent respectfully requests that an order be entered herein requiring the Polish American Navigation Corporation to move at such time as the Court may direct, the Steamer Poznan from Pier 6, Brooklyn, to an empty dock, and in the event that the said Polish American Navigation Corporation is unable to find such a dock within two (2) hours' time, said dock to be designated by deponent; further directing that the said Polish American Navigation Corporation work at least ten (10) gangs of stevedores in discharging the cargo and that this discharging shall be carried out with all expedition.

[fol. 50] No previous application for the relief herein asked for has been made to any court.

Bartholomew L. Staiford.

Sworn to before me this 4th day of January, 1921.

John B. Foy, Notary Public, New York County.  
New York County Clerk's No. 386. New York  
Register's No. 2366. Certificate filed in Kings  
County. Clerk's No. 120; Register's No. 2182.  
Commission expires March 30, 1922.

## EXHIBIT TO EXHIBIT "G"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW  
YORK

A. M. CAPEN'S SONS, INC., Libellant.

against

403 BUNDLES OF WRAPPING PAPER and ACME OPERATING COR-  
PORATION, Respondents

Affidavit of C. E. Ferguson

STATE OF NEW YORK,

County of New York, ss:

C. E. Ferguson, being duly sworn, deposes and says, that he resides in the State of New Jersey and that he is employed by the Acme Operating Corporation, respondents herein, that it is one of the duties of deponent to represent the said respondent, Acme Operating Corporation at Pier 6, Brooklyn, New York, where the SS. Poznan is now laying. That in the performance of such duties he has attended at this dock for the past two weeks and is fully acquainted with the conditions now existing there. At the present time the dock is congested to such a degree that it is impossible to discharge any more cargo from the SS. Poznan onto the dock than can be handled by one gang of stevedores. The deponent is informed and verily believes that there is approximately 4,000 tons dead weight cargo still aboard the Poznan notwithstanding the fact that the Poznan arrived at this port with upwards of 8,300 tons over a month ago. It has therefore taken one month to discharge one-half of this cargo, whereas in ordinary course of business and with the use of proper diligence and care such cargo should be discharged within nine days. At present there is but one gang of workmen discharging this cargo from the Poznan and from the present condition of things it will take, in the deponent's opinion over three weeks to discharge the balance of the cargo unless the existing conditions by way of dock space and number of gangs used to discharge are changed.

C. E. Ferguson.

Sworn to before me this 4th day of January, 1921.

John B. Foy.



[fol. 52]

## EXHIBIT TO EXHIBIT "G"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF  
New York

A. M. CAPEN'S SONS, INC., Libellant,  
against

403 BUNDLES OF WRAPPING PAPER AND ACME OPERATING  
CORPORATION, Respondents

Affidavit of Matthew Delfino

STATE OF NEW YORK,

County of New York,

Southern District of New York, ss:

Matthew Delfino, being duly sworn, deposes and says:

That he resides in the Borough of Brooklyn, City of New York, and is engaged in the general stevedoring contracting business, and is a member of the partnership of Montanino, Delfino & Company, with offices at 59 Pearl Street, New York City.

Deponent is thoroughly acquainted with the SS. Poznan, deponent's said firm having loaded the cargo into the SS. Poznan in or about the month of September, 1920, which cargo the SS. Poznan took for transportation to Cuba, that at this time there were upwards of nine thousand (9,000) dead weight tons of cargo loaded on board this ship.

Deponent states that in his opinion this cargo could be discharged from the SS. Poznan at the rate of one thousand [fol. 53] (1,000) dead weight tons, daily, at which rate it all should be completely discharged in nine (9) days; that in order to accomplish this there should be employed for this purpose from seven (7) to eight (8) gangs; that the SS. Poznan is large enough to accommodate such a number of gangs working on her at the same time.

Deponent is informed and verily believes that at the present time there is upwards of four thousand (4,000) dead weight tons of cargo now laden on board the SS. Poznan and that if she was moved to a dock where space would permit, the steamer could be unloaded in four (4) days.

That the approximate cost for discharging four thousand (4,000) dead weight tons of cargo would be Seven thousand (\$7,000) Dollars, or less.

Deponent further states that he has been in the general stevedoring business for the past nine (9) years; that he is thoroughly acquainted with the conditions now existing in the Port of New York.

(Signed) Matthew Delfino.

Sworn to before me this 4th day of January, 1921.  
John B. Foy, Notary Public, New York County.  
New York County Clerk's No. 386. New York  
Register's No. 2366. Certificate filed in Kings  
County. Clerk's No. 120; Register's No. 2182.  
Commission expires March 30, 1922.

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[fol. 54] EXHIBIT II TO ADDITIONAL AGREED STATEMENT OF  
FACTS

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF  
NEW YORK

A. M. CAPEN'S SONS, INC., Libellant,  
against

403 BUNDLES OF WRAPPING PAPER AND ACME OPERATING  
CORPORATION, Respondents

Upon reading and filing the order to show cause obtained by Harold Lee, Proctor for Respondent, Acme Operating Corporation, dated January 5, 1921, and the moving papers thereupon and proof of due service of same upon Messrs. Hunt, Hill & Betts, Proctors for Libellant and upon Bullowa & Bullowa, Proctors for Polish American Navigation Corporation and Haight, Sanford, Smith & Griffin; Duncan & Mount; Pratt & McAlpin; Rumsey & Morgan; Kirlin, Woolsey, Campbell, Hickox & Keating; Burlingham, Veeder, Masten & Fearey; Joseph G. Cohen and Randolph & Montgomery, Proctors for intervening shippers, and after hearing members of the Shippers' Committee in person, and the members of the Shippers' Committee having requested the Proctors for the Polish American Navigation Cor-

poration and Acme Operating Corporation to suspend discharging the vessel for one week in order to enable the merchandise to be properly separated on the dock and the dock cleared for further discharging of the vessel and the Acme Operating Corp., the charterer Polish American [fol. 55] Navigation Corporation having acquiesced in said request, it is ordered that the motion of the Acme Operating Corporation be denied with leave to renew in 8 days.

Augustus N. Hand, U. S. D. J.

Dated January 5, 1921.

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IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION—March 23, 1923

LEARNED HAND, D. J.:

The Poznan, being owned by a Delaware corporation, was not in her home port while in New York though there enrolled, *The Plymouth Rock*, 13 Blatchf. 505, *The Havana*, 64 Fed. R. 496 (C. C. A. 2). A maritime lien for wharfage [fol. 56] proper was therefore created if the contract did not preclude it, *Ex parte Easton*, 95 U. S. 68. No one disputes that in a "foreign" port such a lien arises. Indeed, at least in this circuit, such a lien arises in the "home" port, *The Seow No. 15*, 92 Fed. R. 1008 (C. C. A. 2), *The Alliance*, 56 Fed. R. 609, *The Advance*, 60 Fed. R. 766, *The Kato Tremaine*, 5 Ben. 60, *The C. Vanderbilt*, 86 Fed. R. 785. In many of these cases the language was obiter, but such a concurrence of opinion leaves no doubt of the law and unquestionably settles it. My own opinion in *The Isonomia*, January 4, 1922, was wrong, the point apparently not being argued, but stress being laid on the effect of the Act of 1920.

Therefore, this case depends upon whether the usual maritime lien for wharfage did not arise because of the especial circumstance, that the *Poznan* was arrested by the marshal on the day of her docking, December 2, and remained under arrest during all the remainder of the time charged for. It is well settled that after a vessel has

been arrested, unless the arrest is colorable, *The Young America*, 30 Fed. R. 789, *The Nissequoge*, 280 Fed. R. 174, 186, no maritime liens can arise against her, *The Estaban Antunano*, 31 Fed. R. 920, *The Mary K. Campbell*, 31 Fed. R. 840, *The Geisha*, 200 Fed. R. 865, *The Bethulia*, 200 Fed. R. 876, *The Philomena*, 200 Fed. R. 873, *The Astoria*, 281 Fed. R. 618 (C. C. A. 5), *Kjaer v. Etier*, 222 Fed. R. 343 (C. C. A. 5), *The Irages*, 283 Fed. R. 445. This necessarily follows on principle; the ship is in the custody of the Court and the Court alone can pledge her upon such a lien. But at least in consensual lines there must be someone authorized to create them. The marshal cannot and obviously the owner cannot. Hence the Polish American Navigation [fol. 57] Company by its contract could not create any lien after the marshal once took charge. The contract did not at once create a lien for the whole period; that arose *de die in diem* and ceased on December 2, if it ever began at all. Hence in so far as this bill depends upon a maritime lien it must fail.

However, it is not necessary to deny the libellant all relief under the libel if it has any against the fund in court. If the lienors who are entitled to the whole of that fund have in fact enjoyed the benefit of the wharfage service, to the extent of that benefit they may be called on to respond, upon familiar principles. This was the course pursued in *The St. Paul*, 271 Fed. R. 265 (C. C. A. 2). The *Poznan* required wharfage while under arrest; she required the wharfage which she got, or at least the creditors' committee of lienors, or a majority of them, thought so. The cargo was half delivered and as the lienors were cargo owners as well as lienors, they had an interest in where she lay. They naturally did not want part of their consignments delivered in one place and part in another, and the Court declined to move her. Thus the libellant, which furnished the wharf, has an equitable claim on the fund, though not a maritime lien on the ship, and in priority to the lienors to protect whose liens the service was rendered.

It follows, however, that the contract between the Polish American Navigation Company and the libellant is not the measure of that benefit, or of the libellant's claim. That contract ceased to control as soon as the marshal took possession. The measure of recovery will be the fair value

of the wharf between December 2, 1920, and the time when the Poznan could first have been moved. This under the [fol. 58] stipulation was on February 18, 1921, when the cargo was discharged. The stipulation gives no explanation why the ship lay there till March 11, 1921, and there is no reason to charge the lienors with the value of so expensive a wharf between those dates, unless there was no other available, or unless the lienors insisted that she should so lie.

There must be a reference to ascertain the reasonable value of the wharfage between December 2 and February 18 at Pier number six. In addition the libellant will be credited until March 12, 1921, with wharfage at the rate at which the Poznan was berthed after March 12, 1921, with wharfage at the rate at which the Poznan was berthed after March 12, 1921, unless it appears that the lienors insisted on her remaining at Pier number six or that her later berth was not available on February 18, or unless for some other reason it appears that the lienors were benefited by the continued higher wharfage at Pier number six. The lights and other incidental services necessary to the discharge seem to me also properly included, assuming that they actually quickened the discharge, and set free the Poznan for a less expensive berth.

A more difficult question arises over the application of the money, \$9,500, paid by the Polish American Navigation Company to the libellant. The arrest did not terminate the Polish American Navigation Company's liability under the contract. On the contrary, wharfage continued to be due quite as though the vessel was not under arrest. This sum I think the libellant must apply upon the contract as the charges fell due; that is to say, it will cover so many days' wharfage at \$250 and incidentals as uses it up. Thereafter, the fund in court will be chargeable till February eighteenth and later as above set forth with the [fol. 59] reasonable value of the services rendered the lienors.

Unless the parties agree on the amount, this issue will be referred to William Parkin, Esq., as special commissioner.  
March 23, 1923.

L. Hand, D. J.

## IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL OPINION—July 13, 1923

LEARNED HAND, D. J.:

Of course it is true that an equitable lien against a ship will take no precedence over a maritime lien. The lien here established was an equitable lien against the lienor's own rights in the vessel arising after she was in custody. It was a lien on their liens, justifiable in this court only because the Court had custody of the vessel under the arrest. That was the holding in *The St. Paul*, 271 Fed. R. 265. It was not necessary that the lienors should consent, though possibly a consent might here be spelled out. A lien may arise based upon equitable considerations when the circumstances are such that the owners have enjoyed a benefit which it would be unjust for them to retain at the expense of him who rendered the services.

The measure of the libellants' lien will therefore be the benefit which the libellants received from the services rendered. In my first opinion I assumed that this would be the reasonable value of wharfage at Pier Six till February eighteenth and thereafter the reasonable value of the wharf at which she lay after March twelfth. Normally reasonable wharfage will be a proper measure of the benefit received, since without an adequate wharf the vessel could not have been discharged and the libellants could never have realized on their liens against her. Though I do not think the difference will turn out to be of any practical consequence, I have drawn a decree which merely directs the commissioner to ascertain what benefit the libellants received from the use of the wharf. He will understand that this is not meant to change what I said before unless he finds that the libellants did not benefit to the reasonable value of the wharf. He will find the value of that benefit and in doing so he must consider whether after February eighteenth, the lienors would have been adequately protected if the vessel had been moved to a less expensive pier, and whether they insisted upon her remaining where she was. It will be understood that no allowance is to be made for protection to their goods on the pier after discharge

as distinct from the necessary discharge of the vessel herself. In this proceeding the libellant recovers only so much as the lienors have received in benefit of their liens against the ship.

L. Hand, D. J.

[fol. 61] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERLOCUTORY DECREE—July 13, 1923

This cause having come on to be heard on the pleadings and the agreed statements of fact filed herein, and having been duly argued and submitted by the advocates of the parties respectively, and due deliberation having been had in the premises and the Court having filed an opinion herein on March 23, 1923, in which it is decided that in order to determine the rights of the parties a reference is necessary to ascertain certain additional facts unless the parties agree upon same and it appearing to the Court that the parties are unable to agree upon said facts, it is

Ordered, adjudged and decreed that the libellant herein has an equitable lien upon the proceeds from the sale of SS. Poznan in the consolidated suit of Joseph H. Davis against the SS. Poznan in this court, for the value of its [fol. 62] wharfage services rendered to the said libellants in said cause in priority to the prior maritime liens against such proceeds of the said libellants in said consolidated suit; and it is further

Ordered that Henry E. Mattison, Esq., be and he hereby is appointed Special Commissioner to take the proof and report upon the following facts:

(1) The reasonable value of the benefit enjoyed by the libellants in the consolidated cause from the wharfage furnished the SS. Poznan and her cargo by the libellants herein from December 2, 1920, to February 18, 1921, inclusive.

(2) The amount remaining unpaid on such amount.

(3) The reasonable value of the benefit similarly enjoyed between February 18, 1921, and March 11, 1921, if any,

together with the reasons why the vessel lay there during that period.

(4) The reasonable value of any added benefit received by the libellants in the consolidated cause during those periods from incidental services rendered by the libellant herein;

and that he report his findings thereon together with the evidence with all convenient speed.

Learned Hand, D. J.

July 13, 1923.

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[fol. 63] IN UNITED STATES DISTRICT COURT

Before Henry E. Mattison, Esq., Special Commissioner

[Title omitted]

Hearing held at the office of the Special Commissioner, No. 79 Wall Street, New York City, July 23, 1923.

### **Statement of Evidence**

#### APPEARANCES OF COUNSEL

Henry E. Mattison, Esq., Special Commissioner;

Messrs. Davies, Auerbach & Cornell (Mr. Feild), for the libellant, the New York Dock Company.

Messrs. Hunt, Hill & Betts (Mr. Haaren), for John B. Harris Company, Intervenor, and the other libellants in the consolidated cause of Joseph H. Davis against the steamship Poznan and Polish American Navigation Corporation and the Aeme Operating Corporation.

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#### STIPULATION RE TAKING OF TESTIMONY

It is stipulated that the testimony may be taken by a stenographer, signing, filing and certification being waived, stenographer's fees to be taxable.

[fol. 64] It is also stipulated that the Commissioner's fees shall not be the statutory fees, but the Commissioner may make a reasonable charge for his services.



## ARGUMENT OF COUNSEL

Mr. Feild: In order that the libellant may not be prejudiced in any way by compliance with the interlocutory order of reference, made and entered herein on the 13th day of July, 1923, it now states that it does not abandon, but on the contrary insists upon its right to recover according to the terms of its agreement with the owner of the SS. Poznan, and to a maritime lien on said vessel and the proceeds thereof for the amount of such recovery; to its right to preferential payment of said recovery from said proceeds irrespective of its right to a maritime lien therefor; to its right to recover the reasonable or fair market value of the use of the pier from December 1, 1920, to March 12, 1921, inclusive, even though it should not be entitled to recover under said agreement, and to preferential payment of such recovery from the proceeds of said vessel, and its right to such recovery and payment irrespective of the benefit derived from the use of the pier by the owner or the libellants in the consolidated cause of John H. Davis against SS. Poznan et al.

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CORNELIUS D. HOAGLAND, being duly sworn and examined as a witness for the libellant, New York Dock Company, testified as follows:

By Mr. Feild:

Q. Are you in any way connected with the New York Dock Company, the libellant here?

A. I am, as vice president.

[fol. 65] Q. How long have you held that position?

A. Twelve years.

Q. Did you hold that position during the years 1920 and 1921?

A. I did.

Q. What are the duties of your position?

A. The usual duties of a vice president.

Q. What is the business of the New York Dock Company?

A. Owners of warehouses, wharves and piers.

Q. Do you have anything to do with the making of contracts for the use of piers and wharves by vessels?

A. Yes.

Q. What experience have you had in this line?

A. About thirty years' experience.

Q. In the making of contracts for the use of wharves and piers by vessels?

A. Yes.

Q. In the discharge of such duties, have you become familiar with the reasonable and fair market value of the use of piers and wharves in the port of New York?

A. I have.

Q. Describe Pier No. 6, Brooklyn.

A. Pier No. 6 is situated directly opposite our warehouses, the bulkhead only intervening, in Brooklyn, between Fulton and South Ferries, in proximity with Brooklyn Bridge, a most desirable location; it is 494 feet long by 70 feet wide; the pier contains 34,658 square feet, of which 30,800 square feet is shedded.

Q. Are you familiar with the reasonable or fair market value of, and the customary charge for, the use of such piers as Pier No. 6?

Mr. Haaren: Objected to as leading, and on the ground that the witness has not been sufficiently qualified to answer, and on the ground that we are not bound by the answer.

[fol. 66] The Commissioner: I will allow it.

Exception.

A. Yes.

Q. Do you know the reasonable or fair market value of, and the customary charge of such a pier during the years 1920 and 1921?

Mr. Haaren: Same objection.

Same ruling.

Exception.

A. I do.

Q. Do you know the reasonable value of the use of Pier No. 6 in the years 1920 and 1921?

Mr. Haaren: Same objection.

Same ruling.

Exception.

A. I do.

Q. What was the reasonable value of the use of Pier No. 6 from December 2, 1920, to February 18, 1921, inclusive?

Mr. Haaren: Same objection.

Same ruling.

Exception.

A. \$250.00 per day.

Q. What was the reasonable value of Pier No. 6 from February 18, 1921, to March 11, 1921?

Mr. Haaren: Same objection.

Same ruling.

Exception.

A. \$250.00 per day.

[fol. 67] Mr. Haaren: I move to further object to that question on the ground that it is without the scope of the interlocutory decree of Judge Hand of July 13, 1923.

The Commissioner: Overruled. This is all taken subject to Mr. Haaren's objection, and I make the same ruling.

Exception.

Mr. Haaren: I will add to that objection on the further ground that the intervenor is not bound by the reasonable value.

The Commissioner: I will take it for what it is worth.

Exception.

Q. For how long is this charge of \$250.00 a day made?

A. From the time the pier is secured by the steamer until either steamer or cargo is removed, by that I mean until the pier is entirely clear of cargo and entirely clear of steamer.

Q. By that do you mean that the charge shall continue as long as either the steamer or the cargo is there?

A. Yes.

Q. Is this method of charging customary in the port of New York and with the New York Dock Company?

Mr. Haaren: I object, except as it applies to the New York Dock Company, unless something is shown that the witness is familiar with the custom of the port.

A. It is.

Q. Have you, in the discharge of your duties, become familiar with the customary rules and methods of charging generally in the port of New York?

[fol. 68] Mr. Haaren: Objected to as leading.

Overruled.

Exception.

A. I have.

Q. Did you at or about the times referred to, arrange for the use of other piers similar to this by vessels; if so, at what price?

A. I did—at the same price, \$250.00 per day.

Mr. Haaren: These are piers of the New York Dock Company?

The Witness: Yes, that is all I can answer for.

Q. Can you give any specific instances why you made such arrangements?

A. Yes, I have a memorandum of two or three vessels prior to and leading up to a continuation of the same pier, taking up the \$250.00 per day and carrying it on.

Q. Well, how about other piers, similar piers?

A. The same would apply, yes.

Q. Name some of those instances.

A. Well, I have to refer to what I have.

Q. You can refresh your recollection in any way.

(Witness refers to papers.)

Mr. Haaren: May I ask what memorandum that is?

The Witness: This is a record of the time the piers were leased or arrangements were made for piers for steamers from a certain date to the date of this other, at the same price.

Mr. Haaren: When was that record made?

The Witness: At the time I began to look into this matter, [fol. 69] when I was asked for information.

Mr. Haaren: Just recently?

The Witness: Oh, I had these on record for a long time, just merely picked them up.

Mr. Haaren: I mean this memorandum you have.

The Witness: This is my own memorandum.

Mr. Haaren: And you made it up yourself?

The Witness: Just for my own proper use, but I haven't used it—I don't understand your question—this is a memorandum in case I wish to prompt myself in giving dates or figures.

Mr. Haaren: And you made all of those notations yourself?

The Witness: I made these notations, furnished from the records.

Mr. Haaren: But you didn't take the data from the records themselves yourself?

The Witness: I took what I am about to give you, very little data, what I took was only copies of bills that were rendered and paid.

Mr. Haaren: But you didn't take those notes from the original records themselves, yourself, did you?

The Witness: I don't quite get what you mean by original records.

Q. In your position as vice president, are you familiar with the records of the company as to their charges for wharfage and piers to vessels—are you familiar in the [fol. 70] ordinary course of your duties, are you familiar with the company's records on that point?

A. I don't see those records, they are in the auditor's office.

Q. Then I don't suppose you can testify to that.

A. The information is gotten from a person who keeps the records for me.

Q. Let me ask you this—aside from the records, do you from your personal recollection of transactions in which you have participated—do you recall any instances of charges made and the amount of those charges aside from your memorandum?

A. I could give you from the memorandum, but they run into thousands of dollars, thousands and thousands of dollars—

The Witness: None of my answers have been taken from this, Mr. Haaren.

Mr. Haaren: I appreciate that.

The Witness: I haven't looked at them since you made your objection.

The Commissioner: I will permit the witness to testify without regard to the records.

A. \$250.00 a day.

Q. What services, if any, incidental to the use of Pier No. 6, did the New York Dock Company render between December 2, 1920, and March 11, 1921?

A. Furnishing lights, cleaning pier, carting dirt.

Q. Is it customary to furnish such incidental service?

A. Yes.

Mr. Haaren: By the New York Dock Company, you mean?

Mr. Feild: Yes.

[fol. 71] Q. Is the charge therefor in addition to the charge per day above referred to?

A. It is.

Q. What was the reasonable value of such incidental services?

Mr. Haaren: Same objection as before.

Same ruling.

Exception.

A. \$1.00 per light per night or part thereof; cleaning pier, cost plus 10 per cent; carting dirt, one-horse cart, \$2.50 a load and \$1.30 per dump ticket when required; \$5.00 a load for a two-horse cart and \$2.15 for a dump ticket when required.

Q. What was the reasonable value of lights, pier cleaning, carting of dirt and dump tickets in the case of the Poznan between December 2, 1920, and March 12, 1921?

Mr. Haaren: Same objection.

Same ruling.

Exception.

A. For lights I do recollect the amount in this instance—for lights, \$805.00; for cleaning dock, carting dirt, etc., \$323.70.

Q. When a vessel, such as the Poznan, has the privilege of discharging at a pier such as Pier No. 6, does it use the whole pier and did the steamship Poznan use the whole pier?

A. She used the whole pier and both sides of it.

Q. Was it feasible for Pier No. 6 to be used by vessels other than the Poznan for discharging or receiving other cargo between December 2, 1920, and March 11, 1921?

A. No, the steamer was there during that period on one side, and the pier was occupied by its cargo.

[fol. 72] Q. Did the New York Dock Company have any duty, either under contract or general custom, to perform in connection with the discharging of the cargo from the steamship Poznan, or the management or movements of the vessel?

Mr. Haaren: I object to the question on the ground that it calls for an answer that interprets a contract which will speak for itself.

The Commissioner: I will allow it subject to the objection.

A. No.

Q. While the cargo from the steamship Poznan was on the pier, or before it was placed there, was it or any of it in your possession or under your control?

A. No.

Q. Was the steamship Poznan at any time in your possession or under your control?

A. No.

Q. During the years 1920 and 1921, was it the custom of the New York Dock Company or the owners of other shedded piers in the harbor, to make one charge for the use of piers by vessels for mooring and discharging, and another and separate charge for the storage on such piers of goods discharged?

Mr. Haaren: Objected to on the ground that it calls for an opinion that the witness has not been qualified to give, and on the further ground that the rights between these parties would be governed by the contract that existed between them and not by any custom.

The Commissioner: I will overrule the first objection, [fol. 73] and as to the second I will allow it subject to the objection as to what the contract may contain.

A. It was not by the New York Dock Company and by many others, but there may have been exceptions—not by the New York Dock Company but exceptions outside of the New York Dock Company.

By the Commissioner: .

Q. That question referred to the New York Dock Company and others?

A. Yes.

Q. Do you know of any other wharfingers or dock companies that did or did not make that distinction, other than your own?

A. I think I will withdraw that part of it, because only by hearsay and knowing people that deal in the leasing of the piers and agreements made for steamers at piers, such things have come to my ears now and then, but it was the exception.

Q. But this is part of your business as vice president that comes within the scope of your knowledge and duties as the vice president of the company—all I meant was whether in answering Mr. Feild's question you did know of any other wharfingers or dock companies than your own that did or did not make that distinction?

A. No, I say I do not.

Q. In other words, there is no distinction between the form, that is, the rental or the charge, as governed by those particular conditions?

A. Not to my knowledge.

Cross-examination.

By Mr. Haaren:

Q. You said before that the business of the New York Dock Company was the owners of warehouses, wharves and piers?

A. Yes.

[fol. 74] Q. You didn't own this Pier 6, did you?

A. Yes.

Q. Wasn't that leased from the city?

A. Our own private property.

Q. Are there any of your piers you do lease from the city?

A. All our own property.

Q. These measurements that you gave before of the pier, 490 feet long—that is over all, is it?

A. Yes, from one end to the bulkhead, from the outer—say from a corner of the pier, river end, right to the bulkhead, straight line.



Q. That includes the farm—

A. No, there is no farm, it is a pier—there may be a part of the pier not covered by the shed, but the pier itself goes to the bulkhead and ceases, then there is a shed put over a certain portion of it, almost to the bulkhead, if it isn't there, it is almost to it.

Q. Have you got the inside measurement of the shed?

A. The inside measurement is 30,800 feet shedded.

Q. What is that in feet wide and feet long?

A. Pretty nearly the same length, there is a string piece all around—that can be made by deduction, an engineer could figure it out, but there is no farm connected with this, just the pier and shed on the pier; when you speak of a farm you mean the bulkhead, there is no bulkhead—there is a bulkhead there but that hasn't anything to do with the pier excepting as an entrance to it and used for business purposes.

Q. You made an arrangement with the Polish American Navigation Company for the use of this pier, did you not?

Mr. Feild: Objected to, the form of this reference excludes the contract entirely, it is confined to reasonable value.

[fol. 75] The Commissioner: I will allow it, it is cross examination, it may not be binding.

Exception.

Mr. Feild: Then I object upon the ground that the facts have already been agreed upon and can't be varied by testimony.

The Commissioner: I will allow it subject to that objection.

Exception.

Mr. Haaren: I offer in evidence the original agreed statement of facts and the additional supplemental statement of facts dated January 20, 1923, for which a copy will be substituted and given to the Commissioner.

Q. You personally made this arrangement for the use of this pier by the Polish American?

A. I did.

Q. Who was the man that represented the Polish American in that transaction?

A. Charles Nevelson.

The Commissioner: This is all taken subject to the same objection.

Q. What was the condition of the pier at that time?

A. Ready for occupancy.

Q. How about the roof, was the roof in good condition?

A. It was accepted as satisfactory.

Q. Do you know whether or not it was in good condition?

A. I didn't go over there and look at it; the roof is always in good condition until a complaint is made, and then it is fixed at once.

Q. But you yourself don't know what the actual condition of the pier was?

A. Well, I didn't go up on the roof.

[fol. 76] Q. You didn't make any arrangement with Mr. Nevelson or anybody else connected with the Polish American Navigation Corporation about any charges or any services, except as appears in these letters, did you?

A. No, that letter of agreement covers the whole thing entirely.

Q. And there wasn't anything in addition to that, was there?

A. Well, haven't you got the letter there?

Q. Yes, I have it here.

A. Then read it—as far as the pier goes, nothing else.

Q. You said before that you leased other piers at the same price of \$250.00 a day?

A. Yes.

Q. Were all of those piers similar to this Pier No. 6?

A. Yes, one of the piers mentioned that I have in mind was Pier 6, leading up to the time that the Poznan took it, and then another pier of a similar size also.

Q. What are the dimensions of that pier?

A. What, the second one?

Q. Yes.

A. A little smaller than No. 6.

Q. And you got \$250.00 a day for that?

A. Yes.

Q. When was that leased with reference to the time the Poznan——

A. It was in the neighborhood of the time the Poznan——

Q. Was it before or after?

A. It may have been before, it may have been during the time.

Q. What was this ship's name that had Pier 6 before the Poznan?

A. If you will give me a chance to look at these bills of mine.

Q. That is all I want.

A. Pier 6, shall I take first?

Q. Yes.

A. We had a bill with the Overseas from September 14th to October 5, 1920, Pier 6, \$250.00.

Q. That is before the Poznan?

A. That is before the Poznan, yes—do you want the amount?

Q. Yes, please.

A. \$5,270.83.

[fol. 77] Q. I meant the amount per day.

A. \$250.00 per day—Chicago Bridge.

Q. How long was she there?

A. Twenty-one days and two hours.

Q. What size ship is she?

A. I don't know.

Q. Do you know how much cargo was discharged?

A. No, sir—this is on the same conditions as the Poznan agreement.

Q. You don't know what tonnage she was?

A. No.

Q. You don't know whether she was larger or smaller?

A. She was a good size vessel; if you had a Lloyd's register here you could find it out now.

Q. What is the next ship that berthed there?

A. I have another now, the steamer Sheridan, Pier 6 again, from October 5—you see they fell right in one after the other—October 5 to October 27, 1920; she was there 22 days and 3 hours, \$250.00 a day, the amount of the bill \$5,531.25, the name of the steamer Sheridan. Now, October 30, the steamer Tuscanstar, Pier 6, from October 30, 1920, to November 29, 1920, for 20 days and some hours, at the rate of \$250.00 per day.

Q. How about after the Poznan, that takes up to the time of the Poznan?

A. That takes up to the time of the Poznan.

Q. What ships after the Poznan?

A. I haven't anything further; I will have to go into it.

Q. Have you any data there on this other pier that was a little smaller than the Poznan?

A. Yes, I have.

Q. Does that show any—

A. That runs back again leading up to.

Q. How about after the Poznan?

[fol. 78] A. I haven't got that here; I only took in the dates from December 2nd to March 11th.

Q. And that runs \$250.00 a day up to the time of the Poznan?

A. \$250.00 per day from October 25th to December 31st, to January 24th, to February 11th, to February 25th.

Q. All \$250.00 a day?

A. Yes, all \$250.00 a day.

Q. You have larger piers than this, haven't you, Mr. Hoagland?

A. Yes, leased, but very few much larger; there is only one other.

Q. Pier 16?

A. No, Pier 16 is leased to the New York & Cuba Mail; at this time we had five, six and nine open for transient work, the rest of our piers were open to be leased.

Q. What size is No. 9 with reference to No. 6?

A. A longer pier, a little wider, but the interior has a great many columns in it that interfere more or less with the entrance to the pier, and the south side is so narrow, the slip, that it doesn't make it as practicable as the other pier; Pier 6 is far more easy to handle than 9, although 9 holds more cargo.

Q. How about No. 5?

A. About 50 feet shorter than No. 6 but about the same width.

Q. Couldn't you have leased any of your longer and larger piers to the Poznan at this time?

Mr. Feild: I object to that.

The Commissioner: I will allow it subject to the objection.

A. No, sir, we didn't have any pier.

Q. At the time you were making this arrangement with Mr. Nevelson, was anything said about these services for lights and cleaning pier and carting dirt?

A. All embodied in the contract.

[fol. 79] Q. That was all a part of the contract?

A. Yes, sir.

Q. What is that contract; what is it composed of—a letter and answer, is it?

A. A letter, yes.

Q. Could I see those letters?

Mr. Feild: I object to it on the same grounds stated before: the facts are agreed upon.

The Commissioner: I think he is entitled to call for it; you opened the door yourself, Mr. Feild, on the question of custom, over objection.

Mr. Feild: I will be glad to amend that.

Q. You could find that letter by Thursday, couldn't you, Mr. Hoagland?

A. Yes, I think so.

Mr. Feild: He can give it to me and I will produce it.

The Commissioner: I think he is entitled to have it produced.

Mr. Feild: In order to shorten matters I would like to strike out from that question of mine, if you will permit it, the question of contract.

Q. Speaking of these services that were rendered to the Poznan, you said they were rendered for a period from February 18th to March 11, 1921?

A. No, I didn't say that, I have only in mind the Poznan, as I remember it, December 2nd to March 12th.

Q. Then your answer to that question about services was with reference to that time?

A. During that period.

Q. You didn't make any allocation of any of this charge [fol. 80] to any period like from December 2nd to February 18th and then for another period from February 18th to March 11th?

A. I don't know of any such allocation but it could have been done, of course, for convenience sake, but I don't know of it.

Q. As far as you know it has not been done?

A. To the best of my knowledge and belief—in fact, I don't know; I think not, but I don't know.

Q. Do you know whether or not any of these dump tickets you speak of were required for the Poznan?

A. I do not.

Q. Do you know whether or not the pier worked at night?

A. Well, practically it is always in work as long as it has anything on it; of course, whatever is there is day or night on there and for night working they would have their watchmen and the ship was there always alongside the pier.

Q. Then if the ship didn't work at night the lights weren't necessary for cleaning, or discharging of the ship, were they?

A. The lights are put there ordinarily for watchmen at night.

Q. They are not to facilitate discharge?

A. If they wish it that way they can use it for that; they usually order the number of lights required for watchmen's services and more if required for discharging the steamer.

Q. Was there any reference made in your bill about whether or not these lights were for watchmen or whether they were for discharging purposes?

A. No.

Q. And of course this carting of dirt and cleaning of the pier would follow the discharge of the ship, that was only preparing the pier for the next ship?

A. That is the idea.

Q. You said that the Poznan used both sides of the pier—[fol. 81] what did you mean by that?

A. One side for lighters and one side for the steamer.

Q. They used the outside of the opposite side to where the Poznan was moored for lighters?

A. Yes.

Q. How long a period were those lighters there?

A. No, I can't give you dates, off and on.

Q. Have you any dates in your memorandum you have there?

A. No.

Q. You don't know whether that other side of the pier was occupied for two or three weeks or the entire time?

A. It is intermittent, Mr. Haaren, just as they disposed of their goods; the ship delivers the cargo, and in making the delivery, the people who had the right to obtain their

merchandise would send for it and their lighters would go on the opposite side of the pier.

Q. These lighters were simply transient lighters taking delivery of the cargo from the pier?

A. Yes.

The Commissioner: Do I understand there was no other steamer using that opposite side during this period?

The Witness: No, all for the use of the steamer Poznan, because a steamer that delivers on the dock must deliver her cargo.

Q. What was this scow that you spoke of before?

A. Did I say a scow?

Q. I thought you did.

A. I don't remember.

Q. You said there was a scow on one side and the Poznan on the other.

A. No, I said lighters probably would be on one side and the steamer on the other; in other words, the steamer [fol. 82] would close up the side of the pier on which she is discharging, and the other side was used to relieve the pier and take the merchandise away.

The Commissioner: That is, the discharge from the steamer was on to the pier, and then removal from the pier on lighters by lighters on the opposite side?

The Witness: Yes.

The Commissioner: But not by direct discharge from the steamer on to lighters on the outboard side of the steamer.

The Witness: Not to the best of my knowledge and belief.

Q. With regard to your testimony before, about charging separately for discharging and wharfage, you said that they would charge both ways—some companies would do one and one the other?

A. No, I didn't make a statement as broad as that; I said that we never charge for two services on one pier: if they have a steamer go to a pier that pier is used for that steamer's cargo and continues until the steamer leaves or the whole cargo is removed, then the charges cease; we don't use our piers for storage, in fact we fight that one feature because that is unjust competition.

Q. But you know of piers in the city—

A. I don't say I know; I say I have heard.

Mr. Feild: I object to what you heard.

The Witness: I guess I had better drop that part of it, because I can't say I know.

Q. Then you don't know whether there is a custom one way or the other, do you—I mean such a custom as is a general custom, as the general way business is done?

A. I believe it is so; I believe that in a great many instances it is so; so far as we are concerned it is always so.

Q. That what is so?

A. That there is one charge right through to a steamer, not a separate charge for storage of merchandise on the pier and another for wharfage of the steamer.

Q. But you wouldn't want to say that there is a general custom in the port of New York to that effect, would you?

A. I guess I won't make that statement, although I think by investigation you would find a great many cases of that kind.

Mr. Feild: Of what kind?

The Witness: Treating the steamer as we do.

Q. Do you know what the size of the largest steamer is or was that berthed at Pier 6 to discharge?

A. I do not; they are all fairly good size steamers.

Q. What do you say is a fairly good size steamer?

A. Well, from 350 to 450.

Q. Deadweight tons?

A. I am talking about length, the tonnage I can't speak of, I don't know about tonnage.

Q. Did you make any inquiry at the time Nevelson was attempting to engage a pier from you, as to what the length and capacity of the Poznan was?

Mr. Feild: I object to that.

The Commissioner: I will allow it.

Exception.

A. Only the length.

Q. The purpose of that being to see whether or not she would jut into the stream or be covered by your pier, is that right?



A. Yes.

[fol. 84] Q. You didn't consider whether or not the pier that the Poznan was going to was going to be suitable for her cargo though, did you?

Mr. Feild: I object to that.

The Commissioner: I will allow it.

Exception.

A. The arrangement was made for that steamer with the understanding that it was a suitable place for her; they accepted it on those conditions.

Q. Did you ask Mr. Nevelson, for instance, how much cargo the Poznan had to discharge?

A. No.

Q. Didn't ask him what was the capacity of the ship?

A. No, that was all left with him; he was engaging the pier.

The Commissioner: The same objection, same ruling and exception applies to all these questions.

Q. You would know whether or not you ever had a steamer there that was of about 11,000 or 12,000 dead-weight capacity before, wouldn't you?

A. I can't say; I don't remember at all.

Mr. Feild: Objected to.

The Commissioner: This is all taken subject to Mr. Feild's objection to this line of testimony.

Q. How long did you expect the Poznan to stay there, Mr. Hoagland?

A. I had no idea, as we had nothing to do with the discharge of the cargo, it was all up to the ship.

[fol. 85] The Commissioner: From the beginning of the first objection, all this line of testimony is taken subject to the objection and the same ruling and exception.

Q. Did the New York Dock Company take any steps to have the Poznan moved after February 18th when she was discharged—first, before that, the Poznan was discharged on February 18th, wasn't she?

A. I don't recollect the exact date.

Mr. Feild: I object to that on the ground that it hasn't been shown any duty was required of it.

The Commissioner: He is simply asking if she was discharged on a certain date, and the witness says he doesn't know.

Mr. Feild: I misunderstood the question.

Q. Did the New York Dock Company take any steps to have the SS. Poznan moved from the New York Dock Company piers at any time from February 18, 1921, until March 11, 1921?

Mr. Feild: Objected to as immaterial and incompetent.

The Commissioner: I will allow it subject to the objection for what it is worth.

Exception.

Mr. Haaren: The decree asks that that fact be specifically found, the reasons why the ship remained at the pier.

A. Not to my knowledge; I should say no, not to my knowledge.

Q. If any steps had been taken, you as vice president of the company would know?

A. I think I would know; I should know.

[fol. 86] Mr. Feild: Same objection.

Same ruling.

Exception.

Q. Did the New York Dock Company take any steps to have the Poznan moved at any time from December 2nd until this time of February 18th?

A. No, not to my recollection, not by me.

Adjourned to 10:00 A. M., Thursday, July 26, 1923.

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Met pursuant to adjournment, 10 A. M. July 26, 1923.

Present: Mr. Mattison, Mr. Feild and Mr. Haaren.

THOMAS F. BAKER, being duly sworn and examined as a witness for the libellant, New York Dock Company, testified as follows:

By Mr. Feild:

Q. What is your occupation?

A. I am a member of the firm of Wessel, Duval & Company, No. 25 Broad Street, New York City.

Q. What is the business of that firm?

A. Steamship business, export and import and merchandise, general merchandise.

Q. As a part of its business, does it have to lease piers or wharves in the port of New York?

A. It does.

Q. Did it do so during the years 1920 and 1921?

A. Yes.

Q. What are your duties as a member of that firm?

[fol. 87] A. I have charge of the steamship department and supervision of the piers.

Q. How long have you been engaged in such duties as a member of that firm?

A. I have been engaged as head of the steamship department since 1907, I think, and we did not lease piers except by daily rental prior to October or November, 1918.

Q. Have you, during that time, had experience both in letting piers and wharves to others and leasing piers and wharves from others?

A. Yes.

Q. Are you familiar with the reasonable value of the use of piers and wharves in the port of New York?

Mr. Haaren: Objected on the grounds that it is leading, and second that it is not within the two opinions and decree of Judge Learned Hand, and that the intervenor is not bound by the answer.

The Commissioner: I think it is leading.

Mr. Feild: I would like to change the form of the question.

Q. In the discharge of such duties as you have just described, did you have to know the reasonable value and customary charge for the use of piers?

A. Yes.

Q. Did you have to do so during the years 1920 and 1921?

A. Yes, sir.

Q. Was it part of your duties to make or approve contracts for the use of piers and wharves during those years?

A. Yes, sir.

Q. Are you acquainted with Pier 6, Brooklyn?

A. Yes.

Q. By whom is that owned, if you know?

A. New York Dock Company.

[fol. 88] Q. Do you know the reasonable value of the use of Pier No. 6 during the years 1920 and 1921?

Mr. Haaren: I object to the question as leading, and as calling for an opinion of the witness that he is not qualified to give, and on the further ground that it is not within the scope of the two opinions and decree signed by Judge Learned Hand, and that the intervenor is not bound by the answer.

The Commissioner: I think it is leading. As far as the question of the intervenor being bound, I will allow it subject to that objection. I would suggest, Mr. Feild, that you change the form of your question so as to ask him what in his opinion was the fair and reasonable value of that pier at a particular time.

You can then object, Mr. Haaren, the same way, and the question of whether you are bound or not is subject to the terms of the order.

Q. What in your opinion was the reasonable or fair market value of Pier No. 6 from December 2, 1920, to March 11, 1921?

Mr. Haaren: Same objection, as leading.

The Commissioner: I will allow it subject to the objection, and the terms of the decree.

A. I would say between \$250 and \$325 per day—that is the full use of the pier, both sides—\$250 to \$325 a day I would say would be a reasonable market value.

[fol. 89] Mr. Haaren: I move to strike the answer out on the ground that it is not within the scope of the two opinions and the decree, and that the intervenor is not bound.

The Commissioner: I will reserve decision on that.

Q. Does that price include any incidental service by the pier owner or is it exclusive of incidental services?

Mr. Haaren: I object to the form of the question, I think you ought to ask him whether or not he considered that in

giving his answer, but I wouldn't like to have him say that that did or did not.

The Commissioner: Why don't you change the form of the question and ask him what that includes, that \$250 per day?

Q. What does this price include?

A. The use of the pier and the berth for steamer alongside.

The Commissioner: When you say use of the pier, Mr. Baker, do you include the items in addition—do you include the items that Mr. Haaren referred to in his testimony, in regard to lights, cleaning, etc.?

The Witness: No, that rate is exclusive of any incidentals.

The Commissioner: In other words, this rate you mention of \$250 to \$325 is a flat rate for the use of the pier, that is the berth for the steamer and the opposite side for discharging, is that right, without regard to—

→ [fol. 90] The Witness: Well, that would be the use of the pier and for what other purposes the lessee might require.

The Commissioner: I mean it is for the use of the pier and possible holding of cargo on it?

The Witness: Yes.

The Commissioner: But it does not include such other items as lights, cleaning and permits, etc.?

The Witness: No, it does not.

Q. What, in your opinion, was the reasonable value between December 2, 1920, and March 11, 1921, of pier lights, cleaning pier and carting dirt?

Mr. Haaren: I object to that on the same grounds as before stated.

Same ruling.

Exception.

A. \$1.00 a night or any part thereof for one light—about \$20 for cleaning pier.

Mr. Haaren: I object to all these answers on the same ground as I objected to the other answer, and make the same motion.

A. (Continuing:) About \$2.50 per load for carting dirt, and while there was a charge made for a permit in case it

should be required, I think of 50 cents a load, I don't recall of any instance where we were obliged to pay or where it was paid

[fol. 91] Cross-examination.

By Mr. Haaren:

Q. Mr. Baker, you say you are engaged in the steamship business—what do you mean by that?

A. We are agents for two lines of steamers.

Q. You don't own or charter any ships yourself?

A. Yes, we do, we charter as well as being agents.

Q. What is your yearly turnover, the firm of Wessel, Duval & Company, approximately?

Mr. Feild: I object to that.

The Commissioner: I will sustain that, I don't think it has any bearing on the case at all.

Q. What proportion of your entire business does the steamship business which you have charge of comprise, approximately?

A. You mean in a matter of profits?

The Commissioner: Just as a general part of the business.

A. Well, our steamship business is in connection with the rest of our business, the merchandising and transportation of our own merchandise as well as outside merchandise.

Q. Do I understand you then that this steamship business is more or less incidental to your main business of exporting and importing and merchandising?

A. Well, it is outside of that scope, I mean it is not limited just to our own business, of course.

Q. But it isn't the main part of your business, the main part of your business is exporting and importing, isn't it?  
[fol. 92] A. It is one of the main parts of the business, divided up in steamship nitrate, merchandising, and it is quite as important as any of the other parts, if that is what you mean.

Q. Would it amount to say one-fifth of all the other business that you do?

A. In what relation—it would depend upon the rela-

tion—one is one class of business and the other is quite different.

The Commissioner: Are you able to separate the steamship end of your business on a percentage basis from the other business that you carry on?

The Witness: No, I cannot.

The Commissioner: You could ask him, Mr. Haaren, just what his personal knowledge or observation or experience has been with regard to the steamship end of the business in the matter of renting piers, or leasing them, without waiving your rights or your objections that you have taken.

Q. How many piers did you lease in 1920?

A. Referring only to lease or daily rental or both?

Q. How many piers did you lease for a long period of time?

A. One.

Q. What period of time was that?

A. Five years—Pier 45, Brooklyn.

Q. When did that lease start and end?

A. It started about the 1st of November, 1918, and is still in force.

Q. And it will run to November, 1923?

A. Yes, unless it is renewed.

Q. What was the size of that pier?

A. That pier is about 630 feet by 50 feet, outside measurements, I should judge it is about 29,000 or 30,000 square feet of space.

[fol. 93] Q. What is the rental that you pay for that pier?

A. We pay \$60,000 a year.

Q. Is that a shedded pier?

A. Shedded pier.

Q. What piers did you lease in about December, 1920, by the day, if any?

A. I have a memorandum here.

Q. May I see it?

(Witness produces paper.)

Q. What are these figures over here (indicating)?

A. Those are figures of wharfage we received for off-shore privileges, aside from the rental of the pier.

The Commissioner: What is the paper?

The Witness: A memorandum of our records, from our records at least.

The Commissioner: Memorandum of what sort, of what kind?

The Witness: Of rent that we secured for the use of Pier 45, and also a memorandum of rent paid for a period from October, 1920, to April, 1921.

Mr. Feild: If that memorandum is not going into evidence, I don't think counsel ought to cross examine on the paper itself.

The Commissioner: Yes, I think that is right. He has stated now what the paper is he has produced, which is a memorandum to refresh his recollection as to the rental which he obtained for Pier 45 covering the period mentioned.

The Witness: And for rentals which we paid during the same period.

The Commissioner: Rentals of what?

The Witness: Of other piers.

[fol. 94] Q.(repeated). What piers did you lease in about December, 1920, by the day, if any?

A. (Referring to paper:) That is to others or——

Q. Well, give from others first, by the day, in December, 1920?

A. We didn't lease any in December.

Q. Did you lease any in January, February or March, 1921?

A. Yes.

Q. What piers did you lease in those months?

A. We leased a portion of Pier 3, Erie Basin.

Q. What portion of it?

A. 200 feet by 50 feet, front, for \$100, before the ship docked, and \$200 for a section 400 feet by 50 feet from the time the ship arrived.

Q. Did you lease any other piers?

A. During this period, no.

Q. That is the only one?

A. In February, yes.

Q. How about January and March?

A. We leased the same pier under a similar arrangement for another steamer during the latter part of Feb-



ruary and March—the first one was January, the latter part of January and early February.

Q. And the second period is February-March?

A. Yes, the first one is January-February and the other is February-March.

Q. And that is the pier about 50 by 400 feet?

A. No, that is a large pier, that was a portion of it.

Q. The portion which you leased was an outside berth and a space on the dock?

A. Part of the pier with a berth adjoining, whether it was the outer end or inner end or which side I don't recall.

Q. But this 400 by 50 feet, that was on the pier, was it?

A. Yes, that was a section of the pier.

[fol. 95] Q. And that is the only other pier besides Pier 45 that you leased from others during this period of December, 1920, to March, 1921?

A. Well, we rented our Pier 45—

Q. I don't mean that you rented to others—that you leased from others?

A. Yes, that is all we rented from others.

Q. Now, as to piers that you leased to others, what piers did you lease in December, 1920, to others?

A. We leased Pier 45, Brooklyn, during December, on the basis of \$300 a day.

Q. That is plus offshore, is it?

A. Reserving to ourselves an offshore berth for which, during part of that period, we secured \$75 a day.

Q. What did that offshore berth—what does that mean?

A. The privilege of lying alongside the wharf for discharging or loading offshore without any use of the dock itself.

Q. In other words, for the mere privilege of lying alongside of your pier, your idea of the reasonable value of that service at that time was \$75?

A. Yes.

Q. How long is the outside measurement of that pier 45?

A. About 630 feet long, I should say.

Q. And that \$75 was paid for the full length of that pier?

A. No, that was just the privilege of the steamer lying for her length that she used on the offshore side.

Q. Would you make any charge for the other part of the pier that was not occupied by the ship?

A. It was included in the rent of \$300 per day, which I referred to just before, just previously.

Q. That is, this \$75 was part of the \$300?

A. No—you asked me about the other part of the pier.  
[fol. 96] Q. The other part of the pier was part of this—

A. The \$300—it was included in the \$300, in other words during the month of December while the pier was rented we secured \$375 a day. There was another steamer, however, that we had an arrangement with, whereby we collected \$175 a day for use of part of the pier and the privilege of berthing.

Q. What part of the pier did that service include?

A. Well, I don't recall at the moment, but I should judge it wouldn't be over half of the pier, less than half, probably.

Q. Do you remember the length and size of that ship?

A. No, I don't recall.

Q. Supposing a ship had come in that was about 600 feet long—could you have berthed her in there for this same price of \$75?

A. The pier wouldn't accommodate a ship 600 feet long.

Q. You said it was 630 feet?

A. But not sufficient wharfage.

Q. Say 500 feet—could you have accommodated a ship of 500 feet?

A. Yes, I should say so.

Q. And she would have gotten that kind of a berth for \$75?

A. Yes, an offshore berth, I believe she would have gotten for \$75, that didn't really make much difference in assessing a ship, for an offshore berth, because we had the space there.

Q. In any event, a ship that was not of too great draft to use that dock, she could have been berthed alongside your pier?

A. Yes.

Q. What piers did you lease to others during January, February and March, 1921, if you know?

A. We leased Pier 45, the entire use of the pier, for \$300 during January and February until the 16th of March at noon.

[fol. 97] Q. That included both sides and the entire space on the dock?

A. Yes.

Q. What ship did you lease that to or what line?

A. In January and part of February to the Black Diamond Steamship Corporation.

Q. For how long a period?

A. That was the month of January and 10 or 11 days into February.

Q. At that same rate?

A. Yes; and from February 11th to March 16th at noon, \$200 a day to Norton, Lilly & Company.

Q. What was the price to the Black Diamond, the same?

A. Yes, \$300.

Q. Did you lease any other piers during January, February and March, 1921?

A. Then after March 16, Norton, Lilly, to May 17th, \$250 a day.

Q. That is the same Pier 45?

A. Yes, same pier.

Q. Did you lease any other piers to anyone else during that time of January, February and March, 1921?

A. No.

Q. Only 45?

A. Yes, that is the only pier we had under lease.

Q. Then your knowledge of the reasonable value of piers in the harbor of New York would be confined to these piers, would it?

A. No.

Q. What other piers do you know about?

A. I have been renting piers since 1909, piers from the New York Dock Company and others, in New York and Brooklyn.

Q. Did you attempt to lease any piers from anyone owning piers other than the ones you have described here during December, 1920?

A. When we require a berth for a steamer we generally shop around to see what we can get a pier for, and before we close for one of these piers I might have called up half [fol. 98] a dozen people or my assistant might have called up half a dozen people, in that way we get a fair knowledge of what the value of the piers are.

Q. Do you recall of any incident in December that you attempted to lease any other pier from pier owners here in the harbor?

A. I can't recall.

Q. I suppose your answer would be the same about January, February and March, 1921?

A. Yes.

Q. In that memorandum you had, Mr. Baker, you have in the upper righthand corner of that some names that evidently are names of ships?

A. No, there are no names of ships—they are only names of firms.

Q. Do those names have anything to do with the leasing of piers to those firms?

A. Yes.

Q. What are the figures that appear alongside of their names?

A. These are all offshore berths aside from the rent that we secured from the use of the pier.

Q. Those are the prices for offshore berths?

A. Yes, but not for the use of the pier.

Q. In your opinion, would the use of lights on a pier at night be of any use in hastening the discharge of a vessel if the discharge wasn't carried on at night?

A. No.

Q. Of course, carting dirt and buying dump tickets wouldn't hasten the discharge or the cleaning wouldn't hasten the discharge of the vessel, would it?

A. Not unless the dirt happened to be in the way of the cargo to be taken out.

Q. If the dirt was cleaned after the cargo was taken out the pier, of course that would be so it would not hasten the discharge, would it?

A. No.

Q. Do you ever lease your piers for the purposes of [fol. 99] merely having a ship lie alongside in the nature of being stored there?

A. No.

Q. This Pier 45 that you lease for \$60,000 for that period five years, that would be a daily rental of approximately \$166 a day?

A. I suppose, it is a matter of figuring, it wouldn't be much out of the way—it is \$60,000 for the year—I presume it would figure out about that.

Q. In your experience in the handling of piers and cleaning them afterward, did I understand you to say that you

never paid for dump tickets to dump dirt, that you never found it necessary?

A. Permits—I never recall any instance where we had to get permits.

Q. In all your experience?

A. No.

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WALTER F. FIRTH, being duly sworn and examined as a witness for the libellant, New York Dock Company, testified as follows:

By Mr. Feild:

Q. What is your occupation?

A. I am assistant general manager for the Estate of William Beard, operating Erie Basin property in Brooklyn.

Q. How long have you held that position?

A. Since 1902.

Q. What are your duties?

A. My duties are to operate the storage and wharfage business, make contracts for the storage of general merchandise and for the furnishing of wharfage, leasing of piers and bulkheads, yards and buildings, and I necessarily naturally keep myself informed as to the demands for wharfage space and storage room and the rates charged.

[fol. 100] Q. Were you so engaged during the years 1920 and 1921?

A. Yes, sir.

Q. Are you acquainted with Pier 6, Brooklyn?

A. Yes.

Q. By whom is that owned?

A. New York Dock Company.

Q. What in your opinion is the reasonable value or was the reasonable value of the use of Pier 6 between December 2, 1920, and March 11, 1921?

Mr. Haaren: I object to the question on the ground that it calls for an opinion of the witness which he is not qualified to give, and on the further ground that it is not within the scope of the two opinions of Judge Hand and his decree, and that the intervenor is not bound by the answer.

The Commissioner: Overruled as to the qualification of the witness. The question is allowed subject to the terms of the order of Judge Hand and subject to further ruling as to whether or not the intervenor is bound.

A. \$250 a day.

Q. For how long would that per diem be charged?

A. From the time the vessel entered the berth to and including the time that the entire cargo was removed from the pier.

Q. Does that per diem include any incidental service on the part of the pier owner?

A. No, sir.

Q. Is it customary for the pier owner to render any incidental service?

A. We always charge for the lights used, for cleaning the pier after the cargo is all removed, and carting of the dirt.

Q. What was the reasonable value of such incidental [fol. 101] service between December 2, 1920, and March 11, 1921?

Mr. Haaren: Same objection.

Same ruling.

A. \$1.00 per light per night or any part of it, about \$60 for cleaning the pier and \$2.00 to \$2.25 per load for carting the dirt.

Cross-examination.

By Mr. Haaren:

Q. How many piers does this Estate that you manage own?

A. At the present time?

Q. Well, how many did they own in 1920 and 1921?

A. Five covered piers.

Q. What was the size of them?

A. The smallest was 400 feet by 70 feet, the largest 1,000 feet by 100 feet.

Q. Do you remember the size of the others?

A. 500 feet by 100 feet, 710 feet by 130 feet, and 380 feet by 125 feet.

Q. Do you remember what you leased any one of these particular piers for during December, 1920?

A. During the period of December, 1920, to March, 1921, the piers were under leases, long term leases.

Q. What was the period of those leases?

A. They varied, all expiring subsequent to March.

Q. How long subsequent to March?

A. Well, some of them are expiring this August, some running into January of next year.

Q. All these leases were made before December, 1920?

A. Yes, sir.

Q. Do you remember how long before?

A. No, I couldn't say that, they were made——

Q. Do you remember what the approximate time of the [fol. 102] leases is?

A. Yes, they run from two to five years.

Q. Then during that period from December, 1920, to March, 1921, this Estate of William Beard didn't have any piers to lease by the day, did it?

A. No covered piers.

Q. You weren't managing any other piers at that time—you were engaged wholly in the management of this Estate?

A. That is all.

Q. Did you during that time lease any piers from any one else?

A. No, sir.

Q. What was the rental reserved in these five leases that you have mentioned?

A. The balance that was due under the lease at that time?

Q. No, how was the rent paid—by the month?

A. The rent was paid in most cases monthly in advance.

Q. And what was that monthly rental?

A. Well, in the case of the smallest pier it was \$5,000 a month.

Q. That is the 400 by 70 foot?

A. Yes, running up to the largest pier would be, I think it is, \$12,500 a month.

Q. What did the 500 by 100—what did that lease for?

A. That leased for \$8,333 a month, it was \$100,000 a year.

Q. And the 710 by 130?

A. That was \$5,250 a month.

Q. And the 380 by 125?

A. That was \$2,500 a month.

The Commissioner: Would there be any difference, or is there any difference when you rent your piers between a rental per diem and a term—that is as to the rate in other words do you get more or less if you rent say by the day or if you rent for a period of one or two or more years?

[fol. 103] The Witness: The shorter the term the higher the rent.

The Commissioner: That is the per diem would be higher—the rate per day would be higher if you were leasing by the day?

The Witness: Yes.

The Commissioner: And you take into consideration the lump sum rental when you are renting for a period of say months or years?

The Witness: Certainly.

Q. During this period, December, 1920, to March, 1921, you didn't rent any piers by the day, did you, to anyone?

A. Not covered piers.

Q. Have you uncovered piers at Erie Basin too?

A. Yes.

Q. How many of those have you?

Mr. Feild: We object to the testimony as to uncovered piers.

The Commissioner: I will allow it, it is cross examination, for what it is worth.

A. At that time we could accommodate at open berths 13 or 14 ships.

Q. Were any of those open piers leased for a long period of time?

A. No, sir.

Q. You leased those by the day, did you?

A. Yes.

Q. What charge did you make for leasing those piers by the day?

A. A ship under the length of 400 feet, \$50 a day, and \$75 a day for over 400 feet.

Q. 400 and over \$75?

A. Yes. During this period, in some instances, we got \$100 for ships offshore at the open dock berths.



[fol. 104] Q. Do you remember any of the cases that you got \$100 a day—what ships you leased them to?

A. If my memory serves me, we furnished a berth to Barber Steamship Company at \$100 a day during that period, that is one instance.

Q. This price of \$50 and \$75 a day, that included the right to discharge cargo on the pier?

A. No, sir.

Q. That was just for a berth?

A. Berth to discharge into lighters alongside.

Q. But they could discharge into lighters, as they tied up alongside the pier?

A. Yes.

Q. And it included no use of the pier at all?

A. No.

Q. Did you lease any of those uncovered piers to merely store ships?

A. No.

Q. That is, ships that would remain moored there?

A. No, we were using all those open docks for commercial purposes, not for laying ships up.

Q. Did you ever lease any of your piers to the Marshal of the Eastern or Southern District of New York?

A. No, sir.

(Recess taken to 2 P. M.)

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#### After Recess

EVERARD W. DAY, being duly sworn and examined as a witness for the Intervenor, testified as follows:

By Mr. Haaren:

Q. What is your business, Mr. Day?

A. Manager of the Exporting Department of Amory Brown & Company.

[fol. 105] Q. How long have you been connected with them?

A. With the firm 20 years, but that particular department 11 years.

Q. Did you occupy that position in December, 1920, January, February and March, 1921?

A. Yes, I did.

Q. What were your duties in that capacity, Mr. Day?

A. Well as general manager of the Shipping and Detail Department.

Q. What did you do specifically—I mean did you see to the shipment of goods?

A. Yes, I saw that the goods were brought down from the various mills where they are manufactured, and from there shipped by various steamers to foreign countries.

Q. Did you arrange for freight space?

A. Yes.

Q. And take charge of the supervision of all forwarding of goods?

A. Yes, from all different mills.

Q. Also receiving of goods?

A. Yes.

Q. Did your duties take you to the various piers from which goods were shipped and on which goods were received?

A. Yes, sir.

Q. How often would you go to various piers in the city on an average per week?

A. All depends—it did depend at that time and before that time, probably two or three times a week—freight was heavy.

Q. That is two or three times a week you would be on some pier around the city?

A. Yes.

Q. In connection with your duty of receiving and shipping goods?

A. Yes.

Q. Approximately how many cases did Amory Brown & Company ship in 1920 and 1921?

A. 35,000 or 40,000 cases a year I guess.

[fol. 106] Q. Have you any idea what that would represent in money?

A. About \$4,000,000 per year.

Q. Your firm of Amory Brown & Company, were they one of the shippers of the Poznan?

A. They were, yes.

Q. About how much goods did they have on the Poznan?

A. About 500 cases.

Q. Representing about how much money?

A. \$300,000.

Q. Were you in charge of receiving this cargo back from the Poznan?

A. I was, yes.

Q. Did anybody else have charge of it except yourself?

A. No, I had charge of it with my assistant.

Q. That assistant—that is Mr. Brett?

A. Yes, Paul Brett.

Q. How often did you visit Pier 6 where the Poznan was discharging?

A. Almost daily.

Q. From what time to what time?

A. Well from the time the boat arrived, the last day of November I think it was, until the time it was taken from the dock.

Q. Until the ship was removed from the dock?

A. No, until practically all the goods were taken from the dock.

Q. Do you remember approximately when that was?

A. About the middle of February I think.

Q. And during that time you were at the pier almost daily?

A. Almost daily, yes, in addition to working for my firm's interest, I was chairman of the Committee appointed by the shippers to assist in the discharge of the ship.

Q. That service that you rendered on that committee was that voluntary or involuntary—did you volunteer to do it?

A. No, there were four or five of us—yes I volunteered to help out.

Q. What was the reason for the formation of that committee?

[fol. 107] A. Well the lack of information we could get from the steamship company discharging the ship, we thought that we could—two or three of us could get with the Polish American or the Acme Company and in that way would be able to assist the shippers in getting the cargo.

Q. Describe the condition of the pier when you first saw it.

Mr. Feild: I object to that—do you mean only the pier itself or the condition of the cargo and all?

Mr. Haaren: Of the pier with the cargo on it.

Mr. Feild: We object to that on the ground that it is immaterial and incompetent.

The Commissioner: What is the purpose of the condition of the pier—is it in regard to the facilities for the discharge?

Mr. Haaren: Yes.

The Commissioner: I will allow it subject to the objection.

Exception.

A. When I first went over to the pier it was cluttered up with cargo, packed in piles all over the pier regardless of driveways for trucks or anything. The one end of the dock, the farthest end, was completely blocked right in with cargo taken from the ship, the dock was very much congested, more than I had ever seen any other dock at any time.

Q. What kind of a driveway did they have for trucks to get in and out for cargo?

A. At that time they started to clear off a driveway and they left an opening probably ten feet wide right down through the center of the dock.

[fol. 108] The Commissioner: This is all taken subject to the same objection, that is this testimony as to the condition of the pier.

Q. That ten foot driveway—would that be wide enough for two trucks?

A. No, it would not, they would allow one or two trucks to go on the dock and load up with as much cargo as they could find belonging to them, and then they would have to wait until they were both ready to leave the dock and then they would both back off together.

Q. Was there room on that pier for a driveway that would permit one truck to pass the other, that is a two truck driveway?

A. No, they could pass if they just happened to come at the hatchways together, the openings of the dock there, there would be a little more room where they could branch out, but through the ordinary part of the dock they could not pass.

Q. Supposing room had been left for a two truck drive-

way, how much space would there have been left on the pier for the storage of cargo?

A. Well there would have been—they would have needed 18 feet for two trucks to pass on the pier, and I would say it was about 55 feet wide or 60 feet wide inside—the difference between 20 and 55 feet.

Q. How long was the pier with reference to the length of the ship?

A. They were about even, about the same length, the ship and the dock.

Q. In your experience in visiting these various piers that you mentioned before, did you ever see a ship the same size as the pier discharging at a pier that it was just as long as?

Mr. Feild: Objected to.

A. Yes, I have, but not with such a cargo as the Poznan had, a ship coming with one line or two lines of cargo then [fol. 109] they could discharge a ship of that size, I imagine at a pier of that size, but with a general cargo like the Poznan I had never seen one before.

Q. Was this pier in your opinion large enough for the Poznan to discharge at with the cargo that she had aboard?

Mr. Feild: Same objection.

The Commissioner: This is all taken subject to the same objection.

A. No, sir, I do not think so.

Q. Were you familiar with the cargo that the Poznan had on board of her?

A. Yes.

Q. Did you go over the records of the manifest and the stowage plan to know practically what cargo she had?

A. Yes.

Q. In connection with your duties as Committee man?

A. Yes.

Q. How did the size of the pier affect the facilities for discharge of the vessel on that pier?

A. Why handicapped the delivery.

Q. In what way?

A. Well the dock for the cargo was entirely too small.

Q. About how much too small would you think?

A. Well I don't think they could have got more than a third of the cargo on the pier.

Q. How did that affect the way the cargo had to be stored on the pier?

A. Stored just as it came off the ship, they didn't have room to segregate it according to marks or numbers or consignees or shippers or any way at all.

Q. In your opinion would you say that the size of the pier was responsible for the greater part of this congestion on the pier?

A. I certainly do, yes, sir.

[fol. 110] Q. What can you say as to whether or not shippers could get goods when they sent trucks for them?

A. Well we would sometimes get a notice that 15 or 20 cases were ready, and we would send a truck over and all hands would start scouring around and look for the 20 cases, they weren't in any particular part of the dock, you would have to look from one end to the other, you might find dry goods over with sewer pipes or pianos over some place else, they weren't together in any way at all, and the consequence was we had to take up one or two cases and start back with it and trust to luck to get some more the next day.

Q. Of course you would have to pay for those trucks that went there and came away empty?

A. Certainly.

Q. About this driveway that you mentioned before—did you at any of your visits to the pier remember seeing trucks damaging cargo because this driveway was so narrow?

A. Yes, I meant to mention that—at times they would attempt to turn around and drive out, but the room was very small and they hit cases or sewer pipes, of which the dock was just full—of sewer pipes all over every place—and I have seen several cases broken right open and the contents thrown on the dock.

Q. Was very much cargo damaged because of this narrowness of this driveway?

A. Yes, I would say lots of it.

Q. A good deal of it you saw yourself?

A. Yes, myself.

Q. What did you find it necessary to do with regard to the employment of watchmen because of this congestion on the pier, if anything?

A. Well we found that lots of the cases were pilfered after they were taken from the ship and before taken from the [fol. 111] dock, that the shippers decided it was best to have a watchman employed, which we did at our own expense, sent watchmen over.

Q. What was the reason for your employing watchmen in addition to those supplied by the steamship company?

A. We didn't think the steamship company supplied enough.

Q. Did the condition that existed over there require the employment of more than the ordinary number of watchmen or not?

A. Yes, it did.

Q. Why?

A. Well on account of the tremendous amount of cargo that was on the dock all the time, and the openings.

Q. What in your opinion would be the size and characteristic of a suitable pier to discharge the Poznan of the same cargo that she carried about which you have been speaking?

Mr. Feild: Objected to as incompetent, immaterial, no bearing on the reasonable value of this pier.

The Commissioner: I will take it for what it is worth.

A. I would say one of the Luckenbach piers or one of the piers down at Staten Island or Pier 16 of the New York Dock Company, or any pier running around 800 or 900 feet long and probably 100 feet wide.

Q. What would your opinion be of the length of time required to discharge the Poznan of the cargo she had on board, at such a pier as you have mentioned?

A. I would say it would take about three weeks at the most.

The Commissioner: This is taken subject to the same objection and the same ruling.

[fol. 112] On the question of the condition of the pier, that is the cargo and the matter of discharge, I will take this testimony for what it is worth, and will reserve the question as to whether it comes within the stipulation or the order of Judge Hand.

Q. In your visits to Pier 6, Mr. Day, did you notice the condition of the roof at all, of the pier?

A. Yes, the roof was leaky and melting snow and water would drop through.

Q. Did that cause any damage to the cargo?

A. It did, yes.

Q. What about your rates of insurance on your goods during the time they were on this Pier 6, Brooklyn—were they higher or lower than the amounts ordinarily charged?

A. Well the fire risk insurance on Pier 6 was higher than other piers in the city, the exact figures I haven't got, but I have the dollar amount we paid for the insurance on that pier.

Q. Why was that, Mr. Day, why was the rate higher?

The Witness: On account of its condition, antiquated dock in comparison to the others, the others that I did mention, the Luckenbach or Staten Island piers, or other piers in Brooklyn at the foot of 33rd Street.

Q. Did you have goods on other docks at other piers in the city at that time?

A. At that time, we did, yes.

Q. Can you say what the difference in rate was approximately between Pier 6 and these other piers?

A. I would say it was twice as much on Pier 6, New York Dock, Pier 6.

[fol. 113] The Commissioner: That is you mean the insurance rate?

The Witness: Insurance rate.

The Commissioner: Rate of premium?

The Witness: Yes.

Q. Can you tell us in what other respects the shippers could have saved money if the Poznan had been discharged at suitable piers like the ones you have mentioned?

A. We would have saved considerable trucking, and the insurance premium would have been lower and wouldn't have covered such a long period; we would have got our goods back sooner.

Q. What would that have meant to you in the shipment?

A. Well we would have got probably more for our materials and a lot of it could have been reshipped back to Cuba, but by the time we had got a complete shipment back from the Poznan the delivery dates would have been so far passed that we wouldn't have sent them back.



Q. What was the general market condition in New York at that time, on a falling, rising or steady market?

A. Falling market.

Mr. Feild: I object to that.

The Commissioner: Same ruling.

Q. You know that was true of your goods, of course?

A. Yes, I can only speak of my own goods on that.

Q. How about the watchman—would you save money—of course you would have saved money if you didn't have to employ them so long, wouldn't you?

A. Yes.

Q. And the same thing would be true of your survey charges?

A. Same would be true there, yes.

[fol. 114] Q. Were those survey charges increased in any way by this congestion that you mentioned before?

A. Oh, yes.

Q. Why was that?

A. Well it just handicapped them that much on account of the cargo being all over the dock, the length of time they were there.

Q. Can you think of any other way the shippers might have saved money if the Poznan had been discharged at a suitable pier like the ones you have mentioned?

A. No, I think I have covered all.

Cross-examination.

By Mr. Feild:

Q. The value of the cargo that you had, I believe you said was \$300,000?

A. Yes.

Q. What in your opinion was the value of the entire cargo of the Poznan—just an estimate?

A. I would say a million and three-quarter dollars.

Q. Was it all discharges on Pier 6?

A. As far as I know it was, yes, sir, some went into lighters—very little though—alongside of Pier 6.

Q. How long was it after the beginning of the discharge of this cargo before the cargo owners began to receive their goods, take them away?

A. I would say about ten days, a week or ten days.

Q. Is that customary in the discharge of the ship?

A. No, sir.

Q. What is the customary practice?

A. About 48 hours, they start carting it right away.

Q. What was necessary before these cargo owners could get possession of the goods?

A. Releases from the Acme, signed by the Polish American Company, upon surrender of the original bill of lading or a bond I believe that was arranged in lieu of that bill of lading.

[fol. 115] Q. That was under order of court, wasn't it?

A. Yes.

Q. They had either to surrender the original bills of lading or else they had to give bond for the value of the cargo?

A. That is it.

Q. You have said that the size of the pier was responsible for the congestion?

A. Yes, that is my opinion.

Q. If they hadn't begun to discharge the cargo until ten days after they did begin, and then the cargo owners had taken away their goods in the usual manner, would the congestion have been what it was?

A. Well I don't—no, I don't think it would, if the cargo had been taken off the ship and segregated into the different shippers' marks, then it wouldn't take as long.

Q. Why didn't the cargo owners take their cargo as fast as it was taken off or as soon as it was taken off?

A. We attempted to, we went over there often enough to get it, but we couldn't find it on the dock.

Q. Wasn't a considerable amount of time consumed in many instances in producing the original bills of lading or giving the necessary bonds to enable the cargo owners to obtain their goods?

A. Not in our particular instance, no, sir.

Q. Do you know whether that was the case with any of the other shippers?

A. No, I don't think anybody held up on that reason.

Q. Why did they wait ten days?

A. Before they were ready to give us notices, we didn't know of any material that was on the dock until after ten

days or a week or ten days, we didn't know what goods had been taken—didn't know what bills of lading to produce.

Q. When did the cargo owners, through the Committee of which you were a member, participate in the actual management of the discharge?

[fol. 116] A. Not until the court order in January some time, then on the recommendation of Judge Knox we went over and attempted at that time to aid.

Q. Did the cargo owners at any time take steps to have the Poznan moved to another pier?

A. Oh, we took steps to object to having it moved to another pier.

Q. You objected to having it moved?

A. I did, yes, sir, I believe that was the Committee's opinion, not to have it moved to another pier.

Q. Do you think a suitable pier for the discharge of the Poznan would be 800 to 900 feet long and 100 feet wide?

A. Yes.

Q. How much more would such a pier have been reasonably worth than Pier No. 6?

A. Well I think one of those piers could be gotten for at that time about \$500 a day.

Q. Do you know whether any such pier was available at the time?

A. Well I believe the Luckenbach had some piers that were available, and Staten Island piers were available.

Q. Is the Staten Island pier desirably located for the discharge of a cargo like this as Pier No. 6, Brooklyn?

A. The dock would be, yes, of course it is not so centrally located, the dock itself.

Q. I mean the location—I am not talking about the pier itself—is it as favorably located for the discharge of this kind of a cargo as Pier 6?

A. Of course the location would be farther away and it would cost more to haul from that pier, but if we could each time get a full truck load it would have been much cheaper.

Q. Did the cargo owners at any time make complaint to the New York Dock Company about the use of that pier?

Mr. Haaren: I object on the ground that it was not incumbent on the intervenors at the time to object, no obligation.

[fol. 117] The Commissioner: I will allow it.

A. No, not as a Committee, to my knowledge.

Q. Was any complaint made about the condition of the roof to which you have referred?

A. Yes, I objected about that to Mr. Siebert who was discharging the ship, and the following morning repairs were being made.

Q. Was there any complaint made to the New York Dock Company?

A. No, sir, not by me or to my knowledge.

Q. Was the condition remedied after the complaint?

A. It was, the one that I particularly called attention to that I noticed, that was fixed.

Q. What amount of damage was due to the imperfect condition of the roof?

A. Well I know it dripped all one day on to a lot of dry goods and it was stained, water stained, and it was sold as damaged goods when they were disposed of, probably at a reduction of 5 or 6 cents a yard, or \$500 or \$600 a case—or for the lot rather.

Q. How many cases were damaged?

A. It covers about five or six cases.

Q. You estimate that the damage was \$500 a case?

A. No, I corrected that by adding the entire lot was probably damaged \$500.

Q. For the entire lot?

A. Yes.

Q. The cargo owners brought suit for the recovery of damages, did they not, for breach of their contract of affreightment?

A. Yes.

Q. Against whom was that suit brought, do you know?

A. Against the ship and the Acme Operating Company and owners of the ship Polish American Company.

Q. Quite a considerable judgment was recovered, wasn't it, against the owners, the Acme Operating Company and the ship?

A. Yes.

[fol. 118] Q. Do you know whether the damages recovered included delay in getting their goods due to this condition at the pier?

A. Yes, the depreciation of the value.

Mr. Haaren: I don't think Mr. Day is competent to answer that—I would like to stipulate that we put the libel

in the consolidated cause and the answers and the opinion of Judge Hand and the decree, the final decree of Judge Hand based upon Commissioner Lacombe's report.

The Commissioner: You can agree that they be submitted.

Q. The cargo owners were enabled to get possession of their goods by the use of Pier 6, were they not?

A. Yes.

Q. Who did the stevedoring in the discharge of the cargo?

A. I don't recall the man.

Q. It was not done by the New York Dock Company, was it?

A. I don't believe so.

Q. Was the stevedoring done in the usual and proper manner?

A. Why it was, as far as the space was allowable to store on the dock?

Q. Was it proper for the stevedore to put the goods on the pier without segregating them according to marks and owners or some other way?

A. No, that was not his duty.

Q. Whose duty was that?

A. I would say the dock company's duty.

Q. To segregate these goods?

A. To get the cargo ready for the proper delivery.

Q. Was any complaint ever made to the New York Dock Company on that ground?

A. The Dock Company, owners of the dock?

Q. Yes.

A. No, sir.

[fol. 119] Q. Do I understand you to mean that it was the duty of the New York Dock Company?

A. No, not the New York Dock Company, not the owners of the dock—the people discharging the ship, but not the stevedore, that is what I meant to convey, it was not the stevedore's duty.

Q. Whose duty was it in this case?

A. I would say the Aeme and Polish American.

Q. If there had been no complications and the cargo owners had proceeded in the usual manner to take away their cargo as soon as it was placed on the pier, how long would

it have taken to have cleared the dock, discharged the cargo and cleared the pier?

A. At Pier 6?

Q. At Pier 6.

A. Well if everything had run along smoothly, I would say about six weeks—seven weeks.

Q. In other words if a pier 800 to 900 feet long and 100 feet wide had been used, the discharge and delivery of the goods could have been done in half that time or three weeks?

A. Yes.

Redirect examination.

By Mr. Haaren:

Q. You said before, of course, at a suitable pier that the discharge would take place at most three weeks?

A. Yes, at the most three weeks.

Q. Did you have releases for the picking up of your goods on the pier as soon as the cargo was ready for delivery?

A. Yes.

Q. Did you ever have any delay due to the fact that you hadn't obtained release for your cargo?

A. No.

Q. What was the reason why or the reasons why the Committee of which you were a member objected to the removal of the ship from Pier 6?

A. Well we were anxious to receive our cargo at one particular place and one particular lot, as fast as we would receive goods from Pier 6 which would represent one of our complete shipments, we would close that particular transaction on our books and we would dispose of that lot, that is why we were against moving it, because we didn't want to go to two or three places to get the goods covered by one bill of lading.

Q. In other words it would have seen a further inconvenience to you if, after she started to discharge, she had maneuvered?

A. Yes, and an additional expense too.

The Commissioner: Additional delay?

The Witness: Additional delay, yes.

Q. This damage that you speak of due to this leak—that \$500 or \$600, that was the only damage due to the leaking roof because of the leak that you noticed?

A. That I know of.

Q. There may have been others that you didn't know about?

A. There may have been others.

The Commissioner: As a matter of fact did you know of any others yourself?

The Witness: Not I myself, no, sir.

Q. Would it have been possible for the persons in charge of the dock that you spoke about before upon the obligation rested to sort this cargo, would it have been possible for them to have sorted it on a pier of this kind, Pier 6?

A. No.

Q. A suitable pier that you mentioned before you say would cost \$500 a day?

A. That is what I would say at that time, yes.

Q. How much would that be for a period of three weeks?

A. 21 days—\$10,500.

Q. And for 14 days would be \$7,000?

A. \$7,000.

[fol. 121] Q. With those figures in mind what could you say as to the comparative losses sustained by the shippers because of the use of Pier 6 rather than one of these other piers—would it be more or less than \$10,500?

Mr. Feild: Objected to.

The Commissioner: I will take it for what it is worth.

A. The shipper's expense?

Q. Yes.

A. That would be just that much less.

Q. I don't think you understood my question—could you say approximately whether or not the loss that the shippers sustained because of the use of Pier 6 for the discharge of their cargo would be as much or more or less than this amount of \$10,500?

A. It would have been less for expenses.

Q. I am not saying expense, I am saying loss—you say the shippers sustained a loss because of the fact that Pier 6 was used?

A. Yes.

Q. Supposing one of these other piers had been used, at which the Poznan could have been discharged in 21 days, the cost of that pier would be \$10,500?

A. Yes.

Q. Supposing the shippers had paid that, \$10,500, would the loss that they sustained because of discharging at Pier 6 instead of this pier, be more or less than that amount, or what amount do you figure that it would be?

A. I must be thick, I don't get that at all—if the ship paid the hire of a 900 foot pier, \$10,000, we would have saved money.

Q. How do you arrive at that conclusion?

A. If we have to pay this claim.

[fol. 122] Further hearing held at the office of the Special Commissioner, No. 79 Wall Street, New York City, August 23, 1923.

Present: Mr. Mattison, Mr. Feild and Mr. Haaren.

ANTHONY SCOTTO, being duly sworn and examined as a witness for the Intervenor, testified as follows:

By Mr. Haaren:

Q. What is your business, Mr. Scotto?

A. Stevedoring.

Q. What is your connection with the Mediterranean Stevedoring Company, Inc.?

A. Vice-President.

Q. What was your connection in December, 1920, and January, February and March, 1921?

A. Stevedoring with the Mediterranean Stevedoring Company.

Q. Was your official capacity the same—Vice-President?

A. Yes.

Q. What were your duties as vice-president of that company—what work did you engage in for the company?

A. I looked out for the work on the outside—when we say outside, to see that the discharging and loading of vessels was done right.

Q. In other words you supervised the loading and unloading of vessels for which your company took contracts for stevedoring?

A. Yes.



Q. And you were in full charge?

A. Yes, I give the rates on them, the company cannot take a contract unless I O. K. it and say that it is all right to take it at a certain price.

Q. Did you have charge of the unloading of the steamer [fol. 123] Poznan in 1920 and 1921?

A. I did, I wasn't there all the time, but I was there at least three times a week.

Q. It was under your supervision that the Poznan was discharged?

A. Yes, I was called by my man there every day by telephone, generally got a report every day as to what was doing.

Q. And you personally visited the pier three times a week?

A. About three times a week.

Q. Did you evolve the method of discharging the Poznan—did you arrange how she was to be discharged and give instructions?

A. Yes.

Q. Tell us how you discharged the ship.

Mr. Feild: I object to that as not within the scope of the reference, and as irrelevant, the method by which the stevedores discharged the ship has no bearing upon the value of the use of the pier.

The Commissioner: I will allow it and take it for what it is worth.

A. We discharged the ship as we would discharge any other ship, but the pier was too full to discharge the cargo of the Poznan—I had no manifests, I done the best I could in regards to marks; if a shipper's name was Kelly, we generally put them in a pile with the K's, not too high, left enough room for a man to go up and down the pile; sometimes the shippers would come for their goods, they might send one of these truck drivers, and a man on the dock by the name of Seibert would send one of his men—he was the clerk of the ship—he would send one of his men to look for this man's goods that was after the stuff—after two or three hours if they wouldn't find the goods, the truck driver would simply go away, wouldn't wait for his goods [fol. 124] at all, but the pier was too small to discharge

14,000 tons, a pier like that, for a cargo like that, could only discharge 4,000 tons.

Q. Was there anything unusual in the way you discharged this ship, or did you discharge it in the customary manner?

A. Customary manner; I had been working for T. Hogan & Sons, and I have had charge of Lamport & Holt's ships, well, say, for three years, as assistant superintendent stevedore for Thomas Munson.

Q. How long have you been in the stevedoring business?

A. Ten years, I was with Hogan for seven years and three years in business for myself—T. Hogan & Sons.

Q. And three years with the Mediterranean Stevedoring Company in addition to that?

A. Yes, seven and three is ten. I have been in the Cunard Line during the strike and I have discharged and loaded the Seythian and—I don't remember the name of the other ship—during the strike of last October, I was in charge of two ships of the Cunard Line, and Captain Miller there can recommend me in regard to stevedoring.

Q. Are the ships that you have discharged and just named—are they as large as the Poznan?

A. Twice as large. I did the stevedoring on a bigger ship than the Poznan during the war, in Hoboken, I had 13 gangs for the American Government over on Pier 2, Hoboken, I think that was the Rijdam.

Cross-examination.

By Mr. Feild:

Q. Mr. Scotto, for whom did you discharge the Poznan?

A. The Polish American Navigation Corporation.

Q. Did the New York Dock Company have anything to do with the stevedoring, the discharging?

A. No, sir.

[fol. 125] Q. You spoke of Mr. Seibert giving orders—who was he, what was his position?

A. Superintendent of the Polish American Navigation Corporation—dock superintendent.

Q. Were these goods removed from the pier as soon as is customary in the discharge of a ship?

A. No, but that was on account that sometimes the truck drivers, as I said before, would come down and they

wouldn't wait more than two hours, they wouldn't wait, they would just go into the office and swear at Mr. Seibert, and say they wouldn't wait, they didn't care if they got the goods or not, but we couldn't do any better than put the marks on the dock the way we did.

Mr. Feild: I object to the statement of the witness that they couldn't do any better both in his cross examination and his direct examination.

The Commissioner: We will let it stand, I don't think it makes any difference as far as the question of having any effect on your position.

Q. Was there anything unusual about the discharge of this vessel?

A. In what way, Mr. Feild?

Q. You have just stated that the goods were not removed as promptly as is customary—was there any other reason of that kind?

A. The pier was too small, the pier was too small, if we had a larger pier we could separate the goods and give truck drivers sufficient room to go up and down the dock, but we only had the gangway on the pier to go just one way, and when we had two trucks down there you couldn't get any more.

Q. If the goods had been removed more promptly, would [fol. 126] you not have had more room on the pier?

A. Well you couldn't remove the goods fast enough for us to discharge the steamer on that dock, you could not remove the goods fast enough for us to discharge the steamer.

Q. Was your bill for stevedoring paid?

A. No, sir.

Q. Any part of it paid?

A. I know it is not paid or any part of it paid; Mr. Musto, the secretary of our company, he generally takes care of that, I don't bother, but I know as a matter of fact he didn't get five cents on the bill; Mr. Musto has to answer that question, I can't answer it because he is secretary and treasurer of the company and he takes care of that, I just take care of the outside work of the company, the stevedoring, to see that it is done right.

Q. Do you know whether you have a suit pending?

A. We have a suit pending.

Q. Whom is that against?

A. I think it is against the shippers and against the steamer, I couldn't answer that question, P. W. Musto is really the man to answer that question.

Redirect examination.

By Mr. Haaren:

Q. Did you do any discharging at night?

A. I don't remember, I can find out through my records.

Q. Do you remember doing any?

A. No, we couldn't discharge at night, if we didn't have room on the pier—there was some days we worked and then lay three or four days idle, that is how it took so long to discharge the ship, we might work a day, block up the pier and then stay three or four days, without throwing a pound of freight down to the dock.

Recess taken to 2 P. M.

[fol. 127]

After Recess

Present: As before.

WALTER GEORGE COCKS, being duly sworn and examined as a witness for the Intervenor, testified as follows:

By Mr. Haaren:

Q. What is your business, Captain Cocks?

A. Inspector of cargoes.

Q. Are you a member of the firm of Pilcher & Cocks?

A. Yes, sir.

Q. How long has that firm been in existence?

A. Well I have been associated with Captain Pilcher for just over four years.

Q. Tell us, please, what your experience is and has been in the past in connection with the unloading and inspection of cargo on piers around this harbor and other harbors?

A. I had been at sea for 20 years, and hold a British master's certificate, have been in New York here for four years during which time I have inspected the discharge of over 2,000 steamers; and also have been in charge of the discharge and loading of steamers during the 20 years at sea.

Q. Were you familiar with the cargo that was on the steamship Poznan in December, 1920, January, February and March, 1921, and the discharge of that cargo?

A. Yes.

Q. How many times did you visit Pier 6, for instance, where the ship lay?

A. Every day for 35 days.

Q. Commencing when?

A. The day after she commenced discharge.

Q. What ordinarily would be the length of time that a [fol. 128] ship of the size and capacity of the Poznan would have discharged a cargo of the character that she carried?

Mr. Feild: Objected to unless he states under what conditions it should be discharged.

Objection sustained.

O. At a pier suitable for that size of ship and character of cargo?

Mr. Feild: Object to that because it calls for a conclusion.

The Commissioner: I think he is qualified to answer that, I will allow it.

A. 14 to 16 days.

Q. Will you please then describe, Captain Cocks, the method of discharge of the cargo of the Poznan and the disposition of it made after it had been discharged?

Mr. Feild: I object to that because the method of its discharge has no bearing upon the reasonable value of the pier.

The Commissioner: I will take it for what it is worth.

A. The discharge of the cargo was carried on in the ordinary way by the ship's tackles and booms, and landed on the pier and distributed on the pier where room could be found, but owing to the narrowness of the pier it was not possible to separate the cargo in such a way as to facilitate the delivery, the pier being approximately about 65 feet wide, and having a big tumble home the whole area of the pier couldn't be used; it was not water tight, snow [fol. 129] and rain came in the sides of the pier, therefore

the cargo had to be kept away from the sides from two to three feet.

Q. That is from the sides of the pier shed?

A. Pier shed; a driveway was left along the center of the pier for trucks to go down, and this left only about 25 feet on either side to store the cargo; marks couldn't be separated and kept clear because there wasn't sufficient space to do it; this led to considerable confusion on the wharf in the way of delivery, also it was so small that the trucks in going up and down the wharf damaged the cargo along the driveway, and if more than one truck went along the pier to get the cargo, the others had to wait outside until that came out; in fact, the smallness of the pier, the narrowness of the pier generally stopped the quick delivery of the cargo.

Q. What do you mean by tumble home?

A. The pier shorter, where it joins the pier, that is the sides join the pier were shorter at the top, it is a very low pier and it comes in at the top.

Q. The gable of the roof, you mean, runs very low?

A. No, from the pier itself, the main pier when it comes in it is a very low pier and it runs home, tumbles home very quickly.

Q. When you say the pier are you speaking of the shed?

A. Speaking of the shed, there is the main pier, the shed comes down to the sides and then it comes home to the top.

Q. Even before it reaches the gable?

A. There is no gable, it is a flat top, the cargo keeping away from the sides you couldn't go high with it at all, you have to keep well away from the sides to stow it at all.

Q. In other words the sides of the shed slant so——

A. More so than any other pier, that is of the section [fol. 130] nearest the shore, about 350 feet, the other end of the pier is narrower than the 300 feet and made of corrugated iron which is rusted through in many places and not water tight.

Q. What was the condition of the roof, if you know, captain?

A. It was leaking in several places but not badly.

Q. What was the result of the trucks backing into and damaging the cargo as you stated?

A. That was a result, the damage to the cargo, that is

owing to the narrowness of the driveway left, there wasn't room for the truck to turn.

Q. Would the damaging of the cargo and the breaking of cases make it more difficult to watch and require a greater number of watchmen, for instance, and would other incidental results of that kind follow?

A. Undoubtedly, where there were broken cases they had to put separate watchmen to keep eyes on it.

Q. Would it make it more difficult to survey?

Mr. Feild: I object to this line of questioning.

The Commissioner: I will take it for what it is worth.

A. The increase of breakage or smashing of cases makes the survey more expensive and delays delivery.

Q. Did Pier 6, at the time that the Poznan discharged, have a sprinkler system or other fire preventive facilities?

A. I didn't notice any.

Q. What was the result of that?

A. If it had not, it would increase the insurance naturally on the cargo on the pier.

Q. Would Pier 6, in the congested condition that you describe, be as easy to watch, and could it be watched by as few men as another pier where the cargo would not have [fol. 131] been confused and piled up?

A. No, you would have to employ double—more than that number of watchmen to watch the cargo.

Q. And would that make pilfering—I mean would this condition make pilfering easier or more difficult?

The Commissioner: Your questions are very leading, Mr. Haaren.

Mr. Haaren: Strike that out.

Q. What would be the effect of the condition of Pier 6 you have described on the ease or difficulty of pilfering of the cargo?

A. The general mix-up of the cargo on the pier would aid thieves in opening and breaking cases and taking goods out and stealing cargo.

Q. From observations of Pier 6, what would you say as to its suitability for discharge of a cargo of the character of the Poznan's cargo?

A. For a cargo of that nature it is unsuitable.

Q. In what way?

A. Not being weather tight, and being small, not allowing the proper distribution of the cargo over the pier so that the owners of the cargo could remove it easily, being far too narrow.

Q. What would you say would be a proper pier for the Poznan to discharge at?

A. The larger the pier they could get of course the better it would be, the pier we usually get general cargoes in would be half of a thousand or a 1,300 foot pier and from 100 to 150 foot wide, that would be a very suitable pier.

Q. What kind of cargo do you think that Pier 6 would be a suitable pier for?

A. A number of cargoes, that is otherwise any cargo of that description, say of coffee, hides, cocoa, a ship lying [fol. 132] alongside discharging linseed and taking a part cargo on the wharf—there are numerous cargoes would go on the wharf that wouldn't damage, are taken away frequently to warehouses right next to them, cargoes that are mostly all of one kind or two or three kinds but certainly not a mixed and varied cargo that we usually term general cargo.

Q. Do you know offhand how long it took the Poznan to discharge?

A. About three months I think it was, I am not sure.

Q. What in your opinion was the reason for this delay in the discharge of the cargo?

A. Unsuitability of the pier.

Mr. Feild: This whole line of testimony is subject to my objection and exception.

Q. Suppose, Captain Cocks, that instead of working the ship as much as the stevedores did, and piling the cargo on the pier, they had waited until sufficient space was afforded by the shippers taking delivery at the pier in the customary manner, would the ship have been discharged as quickly or not as quickly as the Poznan was discharged, in your opinion?

A. If the cargo had been discharged and laid out all over the pier and then the ship stopped discharging until the consignees removed the cargo from the pier, and then the



ship went on discharging and the same thing happened again, she would be double as long.

Cross-examination.

By Mr. Feild:

Q. I understood you to say that a suitable pier for discharge of this cargo would have been 1,000 to 1,300 feet long by 100 to 150 feet wide—do I understand you to say a half of that pier or all of it?

A. Yes, a half; of course if they would have had the [fol. 133] the whole pier it would have been much better, but I merely say the half because that would be usual, that would be quite all right for the ship and give them more room, but of course the bigger the pier of course the better it would have been, but it wouldn't be usual to have a pier that long for a ship.

Q. Would the half of it be taken longitudinally or—

A. That would depend of course how it was let out, if you had it across the pier, that is the lower or the upper half as it were, it would make it a little more trucking, but it wouldn't be shifting the ship, if you had a half longitudinally you would have to shift your ship to discharge the cargo, it would save shifting if you had say half right across the pier but it would be longer trucking.

Q. Do you know the value of the cargo on the Poznan, approximately?

A. No, sir.

Q. Were the owners of the cargo benefited by getting the cargo that was on the Poznan?

Mr. Haaren: I object to that. I don't believe the witness is qualified to answer that the way it is put, and he wouldn't know the facts and circumstances which would enable him to say; he can say in a general way.

Mr. Mattison: I will allow it; this is cross examination.

Q. Don't you think the owners of the cargo of goods would be benefited by being able to get possession of it?

A. I think that if owners of goods were able to get possession of the goods naturally they would be benefited by having them in their possession, but that is entirely apart from the pier—you didn't mention pier at all.

[fol. 134] Q. Were the owners of this cargo not enabled to get possession of their goods by the use of Pier No. 6?

A. I take it that if their cargo was discharged on to the pier and they took it off they got possession.

Q. Well, they got possession then by the use of Pier No. 6?

A. It was through the use of Pier No. 6 they got possession, yes, that is that wasn't discharged over the side.

Q. What would you say was the benefit received by getting possession of the amount of goods discharged by the Poznan?

A. The benefit received?

Q. You have said that they were benefited by getting possession of their goods?

A. Certainly.

Q. What would be the amount of that benefit in your estimate?

A. It would be getting their goods.

Q. The value of the cargo gotten?

A. That is, you would have to go a little deeper, providing they were their goods and they didn't have to pay anything extra, if they were their goods and they got them it would be worth that to them, the value of their goods, the same value to them that they claimed on the insurance, so I take it the same benefit to them whether they got them or not.

The Commissioner: That would be assuming that they were insured?

The Witness: Assuming that, yes, sir.

Q. But assuming that they were not insured or making no assumption about insurance, the benefit you think would be approximately the value of the goods received?

A. Unless they had a claim against the steamship.

[fol. 135] Mr. Haaren: I object to that question as misleading, Mr. Feild certainly isn't claiming that the value of the pier to the ship was worth over a million dollars and he knows the goods are.

The Commissioner: I will allow it subject to the objection.

Q. Do I understand then that the value to the cargo owners of getting possession of their cargo would be the

value of the cargo less the value of any claim that they might get out of the ship, less the amount that they might recover out of the ship?

A. No.

Q. Have you no way of estimating the benefit to the cargo owners of getting possession of their cargo?

A. I have no way, no, there would be so much to take into consideration as to what really was their value.

Q. How much slope was there in the sides of this building?

A. I didn't measure the slope, approximately one foot in three.

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NOEL P. PILCHER, being duly sworn and examined as a witness for the Intervenor, testified as follows:

By Mr. Haaren:

Q. What is your position, captain, in relation with the firm of Pilcher & Cocks?

A. I am head of it, its business is surveying and inspection of cargoes.

Q. What has your experience been with regard to the discharge of cargo from steamships in this port and other [fol. 136] ports?

A. I was 25 years at sea as officer and master, during which time I had been looking after the loading and discharging cargoes in various ports of the world, and since 1916 I have been stationed in New York during which time several thousand cargoes have passed under my own inspection or those who are under me in the office.

Q. Were you familiar with the cargo on the steamship Poznan in December 1920, January, February and March 1921?

A. Yes.

Q. Were you also familiar with the discharge of that cargo at Pier 6, Brooklyn?

A. Yes.

Q. Were you familiar with the conditions at Pier 6 during discharge?

A. Yes.

The Commissioner: Of course this is subject to your objection, Mr. Feild, and the same ruling.

Q. Captain Pilcher, will you please describe the method of the discharge of the Poznan at Pier 6 and the disposition of the cargo made after the discharge on Pier 6?

A. The cargo was discharged under the usual conditions with ship's derricks and tackles and winches, and after it was released from the tackles it was put in piles along the pier; the men on the pier were unable to put it into piles according to the consignments as is customary with such cargoes to facilitate delivery, and that caused the 12,000 or 14,000 tons of cargo out of the ship to accumulate and be piled up without regard to marks or numbers, making it impossible on many occasions for the shippers to get delivery; the condition was such that when shippers sent their trucks down to the pier, many times they were turned away without getting any cargo at all.

[fol. 137] Q. What was the reason for that?

A. Owing to the confusion on the pier and the mixture of marks and numbers and the consignments they particularly went for being buried, that was due to there being a lack of space to make the assortment that is customary of such cargoes; down the center of the pier there was a 10 foot driveway which was very narrow, the trucks in attempting to turn around on the pier would cause damage that was particularly noticeable on bales of paper.

Q. What would you say would be a suitable pier at which the Poznan could discharge the cargo that she carried at that time?

A. One of the 1,000 foot piers that we have in this port and probably ranging from 100 to 150 feet in width.

Q. What would have been the cost, if you know, of a pier of that type at the time the Poznan discharged in December 1920, January, February and March 1921?

A. The cost of the pier I actually know, was Pier 4 Staten Island, the lower half of that pier was \$400 per day at that time, that pier is 150 feet and I think 900 feet long.

Q. How long would it have taken the Poznan to discharge her cargo at that pier, do you think?

A. From two to three weeks—three weeks would be a very generous and outside limit for such a cargo.

Q. Do you know the condition of Pier 6, that is the bare pier itself at the time the Poznan was discharging?

A. I recall the condition of the pier, I was constantly

over there both before, during and after the discharge of the Poznan.

Q. Will you describe the condition of the pier then?

A. It is an old pier and not in particularly good state [fol. 138] of repair, it is not weather proof or weather tight, and allows snow and rain to beat in, and as far as I remember there was no sprinkler system.

Q. What was the result of the walls of the shed of the pier not being weather tight?

A. It would allow, as I say, the snow and rain to beat in on the cargo, that would cause the cargo to be kept away from the actual sides of the pier, causing a loss of space.

Q. Did you notice whether or not the doors of the pier were weather tight?

A. Well, I take the doors and the sides in one, because the pier is composed of doorways, the sides of the pier.

Q. Would you say that Pier 6 was a suitable or unsuitable pier for the Poznan to discharge at?

A. Most unsuitable.

Q. For what reason?

A. Owing to the size and nature of her cargo, that pier would ordinarily hold about 3,000 tons of 40 cubic feet, taken to a height of five feet, which is customary, anything over that would entail what is known as piling charges, that would mean about one-fourth or one-fifth of the Poznan's cargo.

Q. Do you know whether or not the shippers took delivery of their cargo as quickly as possible under the conditions that prevailed at Pier 6?

A. Yes, and I personally saw trucks down there attempting to get cargo and having to leave without cargo owing to the conditions that existed.

Q. What were the reasons for those conditions?

A. Being unable to get the packages they went for because they were buried among these piles which were necessary for putting the cargo out of the ship, there was nowhere else to put it, the pier being too small for such a cargo, there was no space to separate the different consignments or shipments.

[fol. 139] Q. What can you say as to the amount of space left at the hatches for trucks to load in and for cargo to

be passed through to store properly on the other portions of the pier?

A. There would naturally have to be a runway opposite each hatch in order to allow the men to get their hand trucks into the hatchways to take the cargo away from the tackles, and that ship I think had six hatches, so that that would be six runways opposite the hatches; that also deducted considerably from the space where the cargo would be placed.

Q. What did you notice, if anything, about the manner in which it was necessary for the trucks to drive in and out of this one truck driveway you described before?

A. Well, if there was more than one truck on the pier, the inshore truck would have to get off the pier before the outside truck could get off, the one locked the others in, there was no way on the pier for trucks to pass one another.

Q. Do you know of any other ship that was berthed at Pier 6 and discharged her cargo there?

Mr. Feild: Objected to.

The Commissioner: I will allow it.

A. Yes, I recall the Ben Cleuch at the end of July 1917.

Q. What kind of a ship was she?

A. She was a small vessel probably about one-third of the size of the Poznan, she was discharging a cargo of lemons, and owing to the size of the pier she filled up Pier 6 and had to complete her discharge at Pier 9.

Q. Can you tell us anything of the result of the con-[fol. 140] fusion that the cargo you say was in and the damaging of the cargo by the trucks passing in and out?

A. The confusion resulted in a great deal of delay, pilferage, extra expenses incurred by having watchmen there for a period of three months: from our own office we had a man on that pier each working day for the full period of three months; it necessitated our going down daily, sending an expert over each day to watch the conditions that existed and keeping a record of them; the small driveway did undoubtedly do some damage to the cargo by the trucks banging against them in attempting to turn around, and no doubt there were many other expenses that I couldn't possibly relate for a period of a delay of over what would be a normal time to discharge such a vessel.

Q. Would it have made any difference in the size of your bill, for instance, if this Poznan had been discharged at a suitable pier such as you have described?

A. Cargoes of that class discharge at what we call customary piers. I think our bill would probably have been very considerably reduced but to what extent I cannot say, but it would have undoubtedly been cut considerably and one fact alone that our Mr. Ryan would have been in our pay for perhaps from three to five weeks, that is including all the time the cargo was on the pier awaiting delivery, as against three months, and it would not have been necessary for one of our experts to go over there for such a long period of time.

Q. Of course the same thing would be true of bills for watchmen and other expenses of that kind, they would be proportionately reduced, wouldn't they?

A. Yes.

Q. Captain Pilcher, supposing after the discharge of this [fol. 141] cargo had been commenced, the Poznan had been moved to another pier to complete her discharge, what is your opinion of the result that would have ensued?

A. It would have increased the expenses considerably, from the fact that trucks, in order to collect a shipment, would have to visit two piers instead of one; as far as we were concerned, we would have had to have an expert to go over to two piers instead of one, and we would have also had to appoint two men to be stationed on the piers instead of one who was there constantly during every working hour.

Q. Would it entail the necessity of employing additional watchmen, too?

A. There would have been a double set of watchmen.

Q. What effect would it have had on the confusion of the cargo, do you think?

A. So far as the cargo is concerned, putting it on the two piers you would have had a better selection, it would have been better facilities for delivery if they had had this additional space.

Q. What can you say as to the manner in which the stevedoring of the cargo was performed in discharging it?

A. That was done by a recognized firm of stevedores, I think it was the Mediterranean Stevedoring Company, and

done under normal conditions in the usual and customary manner.

Q. Was any of the cargo of the Poznan discharged over the side into lighters?

A. Yes.

Q. What benefit would these shippers have derived from the use of Pier 6, do you suppose?

A. That is a difficult question to answer. To compare the benefits derived and the receiving of their depreciated cargo as regards the breakage and delay and so on.

[fol. 142] Q. When I said benefit—I said benefit from Pier 6.

A. I don't know as I can answer the question, I don't see what benefits were derived from it. The goods might have laid in the steamer and if the steamer had refused to deliver them, I presume the shippers would have billed them for the full amount of their goods, it is not up to a shipper or consignee to provide a pier, it is up to the ship.

Q. Did you ever hear of a consignee or a shipper of goods paying for wharfage of the goods except where it was in the nature of storage?

A. No, sir.

Cross-examination.

By Mr. Feild:

Q. What was the condition of this cargo on the ship, captain?

A. Very bad, speaking generally.

Q. Do you not think that some of the confusion on the pier was due to confusion of the cargo in the ship?

A. Not so far as the selecting or the sorting of the different shipments would be concerned, in making the usual assortment for the purpose of delivery, the marks and numbers were clear on the packages, particularly case goods, in the ship, although there were packages that had undoubtedly been tampered with and things stolen out of them.

Q. Were there goods in the ship segregated as to marks and numbers in the ship?

A. Not that I recall, they would be stowed approximately as they came down to the ship in different lots, the ship-



pers send their goods to the ship and they are put on a pier and then put into the ship, but they are not put into the vessel by marks and numbers, that is all one shipment placed in one particular spot and so on.

[fol. 143] Q. Now you say from two to three weeks would be the time usually consumed in discharging this vessel at a much larger pier?

A. Yes.

Q. Do I understand from that that is the time for the actual discharge on the pier and not the time for the delivery from the pier?

A. That is the time taken for the discharge.

Q. The actual placing of the goods on the pier?

A. The actual discharge, yes.

Q. If, when the Poznan was discharged, the stevedores had properly segregated the goods on the pier and had filled up the pier properly, then stopped and allowed the cargo owners to get those that had been discharged, how long would it have taken, in your judgment, in your opinion, to have discharged the Poznan in that way, after they were removed, then discharge more?

A. That I couldn't say, I couldn't say, it would undoubtedly have taken a much greater period of time if that had been done.

Q. Greater than what—greater than the two or three weeks?

A. Oh, no, greater than allowing the vessel to discharge as she did, day after day.

Q. The whole cargo could have been discharged say in three weeks taking the outside time?

A. Oh, yes.

Q. Could a fourth of it have been properly discharged on Pier No. 6—I mean discharged on Pier 6 and properly arranged so as to be easily accessible?

A. I don't think they could have discharged one-quarter of that vessel's cargo and placed it in selections ready for delivery, there would not have been space for such a procedure.

Q. Could they have discharged and properly placed a fifth of it?

A. I don't think so.

[fol. 144] Q. What part of it could they have discharged properly?

A. I wouldn't like to say just what proportion, but to try and get it in one's mind you must take a pier 465 feet long and 65 feet wide and a ten foot driveway, and to place these different consignments separately by their marks and numbers separately, for shippers to come and take, you could not get very great piles together, if you were to put one-quarter or one-fifth of that vessel's cargo out, I don't think you would find it confined to such large shipments that you could block it all together or take it to any great height.

Q. Well, suppose one-fifth of the cargo had been discharged and placed on Pier 6—how long should it have taken the cargo owners to remove that one-fifth?

A. That I cannot say, I wouldn't even like to guess; one-fifth of that vessel's cargo was nearly 5,000 tons, on a pier that is only capable of holding 2,000 tons at a five foot height or 3,000 tons at a five foot height, and only room for one truck to drive down, I wouldn't like to give an estimate.

Q. Is Pier No. 6 conveniently located?

A. Oh, yes, I have no objection to the location.

Q. It is a very desirable location?

A. I wouldn't call it particularly desirable, but I wouldn't make any objection to its locality, it is on the other side of the river and the trucks have either to come by the Fulton Street ferry or else go over Brooklyn Bridge.

Q. Is it more desirably located for the delivery of such a cargo as was in the Poznan than this pier you have referred to on Staten Island?

A. I would prefer Staten Island, any of the piers at Staten Island, very much, naturally a great number of the large Eastern steamers discharge there, such vessels coming in as Twedell & Company's, or Nippon Yusen Kaisha, Houlder, Weir & Boyd, and other large concerns that are interested in Eastern trade discharge there with satisfactory results.

Q. How did the consignees get their goods from Staten Island?

A. By truck or lighter, a great deal of it is trucked and comes over on the ferries.

Q. Doesn't that entail a considerable expense in time and money?

A. I don't know what the expense entailed is on the

trucking, but the trucking is there and exists, what the expense is I don't know as compared with trucking from Brooklyn.

Q. Why did you select the pier in Staten Island as one with which to compare Pier No. 6?

A. I wasn't selecting the pier in Staten Island, I merely mentioned that pier because it was the only one that I had actual knowledge of the rental; if I had mentioned other piers I could have mentioned numbers in Brooklyn and the North River, the whole of the Bush Terminal, excellent piers, and down at the pier at 57th Street, I think it is Pier 17, East River, over in the North River there are a number of good piers, but I don't know what they were rented at at that time.

Q. Do you know whether they were available?

A. That I can't say.

Q. Do you know whether this pier on Staten Island was available the last of November or first of December?

A. It was not available.

Q. Do you know of any pier suitable for the discharge of the Poznan that was available the last of November and the first of December?

A. I do not recall what piers were available in the harbor as I have no record of such things.

[fol. 146] Q. You referred to a vessel that discharged a cargo of lemons at Pier 6 or rather a part of its cargo at Pier 6 and then moved to another pier and discharged the balance—do you know whether it paid for the wharfage at both of those piers?

A. I don't know, but I do know that the steamship company had very great difficulty and trouble in the delivery and they had very heavy bills to pay on account of breakage.

Q. Who was operating this pier on Staten Island at the time of this shipment?

A. I think it is called the Oriental Operating Company, I think it is known as that.

Q. I understood you to say that you didn't know the price of any other piers at that time except the Staten Island pier?

A. No, that is the only one I have knowledge of.

Further hearing held at the office of the Special Commissioner, No. 79 Wall Street, New York City, October 5, 1923.

Present: Mr. Mattison, Mr. Feild and Mr. Haaren.

LELAND B. HOLLY, being duly sworn, and examined as a witness for the Intervenor, testified as follows:

By Mr. Haaren:

Q. What is your business, Mr. Holly?

A. Wharfage, lighterage.

Q. In what way is your business connected with those things—what do you do—do you hire out lighters, do you [fol. 147] lease piers or just what do you do?

A. We are in the lighterage business as a principal and the wharfage business as principal and broker.

Q. What is the name of your company?

A. New York Maritime Service, Inc.

Q. What is your connection with that company?

A. Vice president.

Q. What specific duties do you have—what do you do in connection with the company's business?

A. General supervision and management.

Q. How long have you been in this business?

A. Since 1919.

Q. Have you been in it continuously ever since?

A. Yes.

Q. Was this part of your company's business to lease piers in the harbor of New York during December, 1920?

A. It was.

Q. In the carrying out of that business, did you keep records of piers that were available in the harbor at that time?

A. We did.

Q. Can you say offhand, during the time before and after December, 1920—can you give us an approximate idea of how many piers you would lease during the month to ships discharging in this port?

A. I can't recall exactly.

Q. Approximately.

A. We probably had from 15 to 20 ships on berth during that month, that year, I don't mean to say that they occupied the whole pier, I don't mean 15 or 20 piers, 15

or 20 ships, some have offshore berths, some have half of a pier or a quarter of a pier, depending on the size.

Q. What can you say as to whether or not there was a pier available in the first week of December, 1920, in this port?

Mr. Feild: I object to that as incompetent, irrelevant and immaterial.

[fol. 148] A. I couldn't recall offhand without referring to records.

Q. Can you say whether or not you know whether or not there was a pier available at that time in the harbor?

A. We were leasing piers at that time, there must have been space available otherwise we couldn't have done it.

Mr. Feild: What do you mean by leasing them—you leased them for yourself or you leased them to somebody, in other words were you leasing them or letting them?

The Witness: Use the word let.

Q. You were hiring them out to ships, for ships to discharge at?

A. Hiring them out to ships.

Q. Do you remember whether or not you leased piers to ships that were as large as 7,000 or 8,000 tons deadweight?

Mr. Feild: Same objection.

A. Yes, we did.

Q. Then you can say that there were piers available in the harbor for a ship of that size during the first week of December, 1920?

Mr. Feild: Same objection.

A. I can't say definitely because I don't recall the tonnage of the ships that we berthed during that time.

Q. You could, of course, tell this by referring to your records?

A. Yes.

Q. Have you those records with you, Mr. Holly?

A. No, I have not.

Q. Can you recall whether or not Pier 86 in the North [fol. 149] River was available at that time or around that time?

Mr. Feild: Same objection.

A. I recall that we had a steamer on berth during the month of December at Pier 86.

Q. Well, would that mean to you that that pier was available during that time for letting to a steamer?

A. Well that is another question I can't answer definitely because I don't recall the date.

Q. I show you a memorandum made in your office on your scratch pad, and ask you whether or not you can refer to that and recall that that was taken from your records, and whether or not the data shown there is correct?

A. Yes, I recall this.

Q. Can you refresh your recollection from that memorandum and say whether or not the piers noted there were available during say the first week of December, 1920, and the prices at which those piers were let?

A. There are no dates given on this memorandum, but they are all steamers—are all piers that were let during the month of December.

Q. Can't you recall that the reason for noting these piers was the fact that they were available during that first week in December?

Mr. Feild: Objected to as incompetent, irrelevant and immaterial, and also for the further reason that it is leading.

A. No, I don't recall that.

Q. But you say you can recall that Pier 86 was leased to a ship during December, 1920?

A. Yes.

Q. At what price was that pier leased?

A. \$300 a day for a section 75 by 500.

[fol. 150] Q. What kind of a pier is this Pier 86?

A. One of the largest in New York.

Q. Isn't that the pier that the Leviathan berths at now?

A. I believe so.

Q. What can you tell us about the availability of Pier 19 at Clifton, Staten Island?

Mr. Feild: Same objection.

A. We had steamers at Pier 19 during December.

Q. More than one?

A. I have no way of showing that now.

Q. But that is your recollection, is it?

A. Yes.

Q. What kind of a pier is Pier 19?

A. A very modern pier, 800 odd feet in length by 135 feet in width.

Q. Can you recall what the price was for the hire of that pier?

A. About \$250 per section, one quarter.

Q. How big would that section be?

A. One quarter of the pier.

Q. That is one quarter of the space you gave, 800 by 135 feet?

A. Yes.

Q. What about Pier 21 at Clifton, Staten Island, did you also have steamers at that pier during December?

Mr. Feild: Same objection.

A. Yes.

Q. What was the character of that pier?

A. Approximately the same size.

Q. As Pier 19?

A. Yes.

Q. How about Pier 46, Brooklyn, what can you say as to that?

Mr. Feild: Same objection.

A. At that time I believe that pier was leased by the Oriental Navigation Company.

[fol. 151] Q. What character of pier was that?

A. It was a smaller pier.

Q. What was the size of that, would you say, Mr. Holly?

A. Offhand I don't recall its size.

Q. Were these piers that you have just mentioned and described—were they such that a ship of 7,000 or 8,000 tons could berth alongside of them, that is to say was the water deep enough?

A. At either of the piers, with the exception possibly of Pier 46—I don't recall the depth of water at 46 at that time.

Q. At Pier 86, North River, and the two piers at Staten Island, there would be no question but that a ship of 8,000 tons could go alongside?

A. No question about it.

Q. Have you had any experience connected with the discharge of ships in the harbor of New York?

A. Not in a practical way—stevedoring, you mean?

Q. Well not stevedoring so much as knowing how long it takes a ship to discharge—would your experience—has your experience been such that you would know how long it would take to discharge say 14,000 tons of weight and measurement cargo from a ship?

A. Depends entirely upon the class of cargo I would say.

Q. Well taking that it is a general cargo?

A. Should be able to discharge a cargo of that kind in two weeks.

Mr. Feild: Same objection to this question and answer, and the further objection that the witness hasn't sufficiently qualified himself as an expert on the discharge of ships.

Q. If the people in charge of the Poznan, which was a ship of 8,000 tons deadweight, and carrying a general cargo of about 14,000 tons by weight and measurement, as I say, [fol. 152] if the people in charge of her had come to you during the first week in December, 1920, do you think that you would have been able to obtain a pier for her during that time?

Mr. Feild: Same objection, same grounds.

A. Probably could have.

Q. Would that pier have been such a pier as one of these that you have described?

A. Should have been one of similar size.

Q. Mr. Holly, from your experience in supplying piers for ships, what would you say as to whether or not a pier with an outside measurement of 72 by 495 feet, containing an area under shed available for cargo of 34,658 feet—what would you say as to whether or not such a pier was a proper pier to discharge 14,000 tons of weight and measurement cargo?

Mr. Feild: Objected to as incompetent, irrelevant and immaterial.

A. I should say that would be for a stevedore to answer.

Q. In the course of your business, don't you advise



people looking for berths whether or not this berth or that berth is a proper berth or not?

A. It depends entirely on whether the cargo is going to remain on the pier or whether it is going to move rapidly and whether it has to be sorted or coopered or what.

Q. What can you say as to whether or not \$250 for a pier 72 by 495 feet outside measurements was a fair price, considering the fact that it was Pier 6, Brooklyn, within a few blocks of the abutment of the Brooklyn Bridge?

[fol. 153] Mr. Feild: Objected to on the same grounds.

A. Prices at that time were about the same you mention, may have varied in different parts of the harbor.

Q. Then you think \$250 was about the market rate, or less or more?

A. About the market rate, may have varied \$25 one way or the other.

The Witness: I would like to make one correction, if I may—I gave the length of Pier 19 as 800 odd feet—it is 1,100 odd feet, 1,135 by 135, the stringpiece I think is about 6 feet.

#### Cross-examination.

By Mr. Feild:

Q. As I understand you, Mr. Holly, Pier 19, Staten Island, is about 1,100 feet long by 135 feet wide—that a cross section of that pier divided longitudinally and latitudinally, outside measurement would be 550 by 67½—what was the price at which such a section was renting during the last week in November and the first week in December, 1920?

A. As I recall \$250 per day.

Q. Is the location of Pier 19, Staten Island, as desirable for the discharge of a general cargo of merchandise as the location of Pier No. 6, Brooklyn?

A. Depends entirely upon where the cargo has to be delivered and how it is to be delivered.

Q. Suppose the majority of it is to be delivered on Manhattan Island?

Mr. Haaren: I object to that because there isn't anything to show in the record that the majority of the Poznan's cargo was to be delivered in Manhattan.

[fol. 154] A. If the cargo is to be lightered it wouldn't make any difference in so far as expense is concerned.

Q. Suppose the majority of it was not to be lightered, but was to be trucked?

Mr. Haaren: I object on the ground that the record doesn't show that the majority of the Poznan's cargo was to be trucked and lightered.

A. Trucking rates would probably be higher than from Staten Island.

Q. Did I understand you to say that you could have furnished a pier suitable for the discharge of the Poznan on December 1st or 2nd, 1920?

A. I said probably could have.

Q. So you don't know of any particular pier that was available and could have been furnished the Poznan at that time—any specific pier?

A. Not without referring to my records.

Q. But you don't know whether the records show that there was any?

A. I can obtain records that will show.

Q. What was the character of the memorandum that you examined there—handed you by counsel?

A. That memorandum was made from my daily wharfage sheets during the month of December.

Q. Did you make it yourself?

A. (Referring to memorandum) No, that is not my writing.

Q. Have you compared it?

A. I was present at the time it was taken from the sheet, I presume it to be correct.

Q. And that memorandum does not show that any particular pier was available at that time, suitable for the Poznan?

A. It merely shows that steamers occupied certain piers at that time.

Q. Isn't it the custom for cargoes of general merchandise, I mean a mixed cargo, to be discharged if possible either at a Brooklyn or Manhattan pier?

A. Not in all cases.

[fol. 155] Q. I don't mean the universal custom, but the general custom, if possible to discharge a mixed cargo at a pier in Brooklyn or in Manhattan?

A. It is a general custom to try to obtain a pier in Brooklyn or Manhattan if possible.

Redirect examination.

By Mr. Haaren:

Q. Where a section of a pier is taken, is it true that only one driveway is necessary to be taken out of the space of that section because of the fact that there is a space for a driveway taken out of the adjoining section, so that a double driveway is maintained?

A. It is a general custom that half of the driveway is taken out of either side.

Q. In other words, in taking a section of a pier, you have the advantage of a double driveway by only taking out the space of a single driveway out of that particular section?

A. I don't follow exactly what you mean.

Q. You say that you only take the space for one driveway out of each section?

A. There is only one driveway at a pier.

Q. When I speak of one driveway, I mean a driveway for one truck, the width of one truck, that space is taken out of each section so that in the adjoining section you have the space of two trucks, don't you?

A. Space for two trucks down the center of the pier.

Q. And you only have to take the space for one of those trucks out of the section you hire, but you have the advantage of the double driveway from the fact that you can use the driveway adjoining?

A. That is the general custom.

Q. Can you remember whether or not there was any great scarcity of piers in the last week of November and [fol. 156] the first week of December, 1920?

A. I don't recall that there was.

Q. If there had been any scarcity of piers, you would have known about it because of your business, wouldn't you?

A. We probably would have recalled it.

Q. Before, when you said that the trucking from Staten Island, in the event of a pier being used down there—you said that the trucking would be higher—didn't you mean that the ferries might be higher but that the trucking would not be higher?

A. The rate per cwt. trucking generally runs a little higher than it does from Brooklyn.

#### Recross-examination.

By Mr. Feild:

Q. Mr. Holly, in the discharge of a cargo, is it considered desirable to have the whole section across the pier so that you can utilize the offshore berth on the opposite side from the ship in order to discharge the cargo on lighters or barges or craft that can come up and take it that way?

Mr. Haaren: Objected to as not within the scope of proper cross examination.

A. I am not a stevedore, but it seems practicable.

Q. There would be no such berth in the quarter section of the Pier 19, Staten Island, that you have referred to, would there?

A. I have rented space at Piers 19 and 21 both ways.

Q. Well this quarter section that you have spoken of here, wouldn't have but one berthing space?

A. Correct.

#### Redirect examination.

By Mr. Haaren:

Q. You say it was possible, and that you did rent, what would be a half section of Pier- 19 and 21, Clifton, Staten [fol. 157] Island, is that right?

A. Yes.

Q. What would be the cost of such a half section—just double the amount of the quarter section?

A. Probably a little less than double—about \$450.

Q. For \$450 you could obtain a space that would be approximately 550 by 135 feet outside measurements?

A. That is right.

Q. Of course it stands to reason that if such a section were obtained, a half rather than a quarter, the discharge of the ship would be hastened even more than it would be in the space of a quarter section of that pier, is that so?

A. I believe so.

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E. W. DAY, recalled as a witness:

Mr. Haaren: The testimony of Mr. Day will tend to show the amount of damage which the intervenor John B. Harris claims was sustained because of the fact that Pier 6, being inadequate, delayed the discharge of the ship.

Mr. Feild: I object to all the testimony along that line as incompetent, irrelevant and immaterial and not within the scope of the reference.

The Commissioner: I will take the testimony for what it is worth, and subject to the objection.

Redirect examination.

By Mr. Haaren:

Q. You are the chairman of this Shippers' Committee appointed by the shippers to take care of their interests on the pier?

A. I am.

[fol. 158] Q. In the discharge of your duties as chairman, did you pay bills of Van Hoesen & Company for watchman services?

A. Yes.

Q. What were the amounts that you paid the Van Hoesen & Company—have you a record of them?

A. Yes, I have here.

Mr. Feild: I object to that as incompetent, irrelevant and immaterial, not within the scope of the reference.

The Commissioner: I will take it for what it is worth.

A. Well we paid the Van Hoesen the total sum of \$1,946.25.

Q. And that was in payment of their services in supplying watchmen on Pier 6, Brooklyn?

A. It was, yes.

Q. During the time the Poznan was discharging, and the cargo was on the pier, is that correct?

A. Yes, that is.

Q. Did you in the same way and holding the same position, pay a bill to Pilcher & Cocks or bills to Pilcher & Cocks?

A. We paid two bills to Pilcher & Cocks.

Mr. Feild: Same objection.

The Commissioner: Same ruling.

A. (Continuing:) Amounting to \$1,294.03.

The Commissioner: What was that for?

The Witness: That was charge for surveying the cargo.

Q. Have you made any calculation of what part of these sums paid the Van Hoesen & Company and Pilcher & Cocks you would have saved if the ship had been discharged in the ordinary course of say three weeks rather than the 78 days which the Poznan took to discharge?

A. Yes, I figured out that if the ship discharged the cargo she received within the three weeks, the expense at the same rate would have been \$842.47 against what we paid \$3,240.28, making a difference of \$2,397.81.

Q. Have you brought with you records from the files of Amory Brown, the company by which you are employed, to show the prices of the kinds of goods that had been shipped by you on the SS. Poznan on her voyage to Cuba, during the last part of December, 1920, and the early part of January, 1921?

A. Yes, I have printed price lists that prevailed during that time.

Q. Are those price lists taken from the files of the company?

A. Yes, are taken from our office records from bound books.

Q. Do those price lists show the actual price at which your goods were sold at that time?

A. At that time.

Q. Do those lists contain all the kinds of goods that were on the Poznan?

A. All kinds, yes, sir.

Q. Have you prepared a list of the kinds and qualities of goods that were actually shipped on the Poznan by you?

A. Yes, I have a list of all the goods on the Poznan, figured into yards and articles.

Q. Have you made any computation, taking the number of yards and the price from those printed lists and extended that into a total?

A. Yes, I have—I have used the price on these price lists prevailing at that time and extended each item.

Q. Have you arrived at any total of the extensions that you have made?

A. Sum of those extensions would be \$101,871.05.

[fol. 160] Q. What does that total represent, Mr. Day?

A. That is the total of moneys we could have received if these goods had been received during the early part of January at the prices prevailing on these lists.

Q. Do you mean by that, that that figure of \$101,871.05 represents the market value of these goods during the last part of December and the early part of January?

A. Yes.

Q. Have you also prepared a list of the goods shipped by you on the Poznan with the extension of the prices actually obtained after receipt of those goods from the Poznan?

A. Yes, I have another list that shows that all itemized.

Q. Have you arrived at any total of the quantity of those goods at the price per yard in the extension made?

A. Yes, this is figured the same way with the prices we actually received for the goods.

Q. What is that total?

A. \$84,562.77.

Q. What does that figure represent?

A. That was the market price we received for the goods on their resale.

Q. Was that the current market price for those goods?

A. It was.

Q. Is there any element of physical damage reflected in that price or not?

A. No, there was no material damage to the goods at all, the total damages were probably less than \$50.

Q. What was the difference between those two totals that you have arrived at, Mr. Day?

A. \$17,218.28.

Q. What does that figure represent?

A. The difference between what we actually received for the goods and the resale and what we could have got for the goods had they been received in early January.

[fol. 161] Recross-examination.

By Mr. Feild:

Q. When were these goods actually sold—I don't ask for every date but generally when were the last of them sold?

A. The last lot was sold, I think the latter part of March—I mean the last sale.

Q. When you testified before, you mentioned certain damage due to a leak in the roof?

A. Yes.

Q. Do I understand your testimony just given that all the physical damage would not exceed \$50—does that include the damage from the leaky roof?

A. Yes, damage from the leaky roof and all, to our particular goods.

Q. When you testified before, your testimony only referred to the damage to your particular goods, as I understood it, from the leak in the roof?

A. Well I think I was asked then at that time, as chairman of the committee what conditions I found the dock in and also I personally said there were two bales of blankets damaged.

Q. Were they your blankets or someone else's?

A. They were our blankets.

Q. So that your damage from the leak in the roof wouldn't exceed \$50?

A. The leaky roof and other damage wouldn't exceed \$50.

Redirect examination.

By Mr. Haaren:

Q. You say the last sale of your goods was made in March, 1921?

A. Yes.

Q. As far as you can remember, were your goods sold soon after you received them from the Poznan or not?

A. Oh, yes, they were sold immediately we received them.



Q. And this physical damage—if that is not considered, the damage that you have testified here, rather this loss [fol. 162] you have testified here of some \$17,000 would be practically due then entirely to delay?

A. Yes, delay in getting the goods.

Q. Were your goods representative drygoods, I mean were they a general line such as comprise the shipment of a great many other concerns on the Poznan?

A. Yes, but probably our materials were cheaper, if that is what you mean—it was a regular line of drygoods.

Q. Would this loss that you have sustained have been sustained by these other concerns, in approximately the same ratio or some similar ratio?

A. Certainly, oh, yes, the prices are all governed more or less by the fabric.

Q. What were these, mostly cotton goods?

A. All cotton goods.

Q. So that the price of cotton was falling at that time?

A. Yes.

Adjourned to 2 P. M., Monday, October 15, 1923.

Further hearing held at the office of the Special Commissioner, No. 79 Wall Street, New York City, October 31, 1923 (adjournment from October 15, 1923, by consent).

Present: Mr. Mattison, Mr. Feild, Mr. Haaren, Mr. Betts and Mr. Maclay.

#### COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Feild: I offer in evidence the amended libel in the case of John B. Harris Company, in the consolidated cause, against the steamship Poznan, the Polish-American Navigation Company and Aeme Operating Corporation, and specifically the 18th and 20th paragraphs and the prayer for relief, and that part of the report in the consolidated cause headed "Measure of Damages" beginning on page 12 and ending on page 15.

Mr. Betts: I object to that as not relevant or material to this inquiry.

Mr. Feild: I also offer in evidence that part headed "Claim of Amory Brown & Co." beginning on page 58 and

ending on page 67. That, Mr. Commissioner, is not offered as part of my original evidence, it is really in rebuttal.

The Commissioner: I will allow those subject to your objection because the testimony on the claim of Amory Brown & Co. was introduced here and the question of the shipments that were discharged from the steamer on to the pier and the damages sustained by those shipments has also been allowed, and this, I take it from an examination of those pages, refers to those two particular points and the testimony on those points was offered and admitted subject to Mr. Feild's objection.

Mr. Betts: But there is no proof that we received the payment of those damages.

The Commissioner: It is not a question of proof of payment; it is simply a question of damages having been sustained. In other words, the question that was raised before the Commissioner was along the line of damages sustained to the property of these various libellants after it was put on the pier, and testimony to that effect was admitted over and subject to Mr. Feild's objection. This testimony is simply along the same line.

Mr. Betts: I assume that it is not to be taken as any evidence of satisfaction of claims.

[fol. 164] Mr. Feild: In addition to that, I want in evidence the decree of the Court confirming this report and the order confirming the report.

Mr. Betts: I make the same objection.

The Commissioner: I make the same ruling.

Copies covering these pages and the paragraphs or parts of the libel and the decree and order referred to are to be substituted instead of being written into the record.

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HENRY V. JULIER, being duly sworn and examined as a witness for the Intervenor, testified as follows:

Direct examination.

By Mr. Betts:

Q. Where do you reside and what is your occupation?

A. I reside in New York City and I am in the steamship business.

Q. With what company are you associated?

A. Oriental Navigation Company.

Q. You attended here in response to a subpoena served upon you, did you not?

A. Yes.

Q. What is your particular connection with the business of the Oriental Navigation Company?

A. I am vice president of the Oriental Navigation Company.

Q. Are you familiar with the piers that the Oriental Navigation Company has had for the last few years, in New York?

A. I am.

Q. Tell us what piers your company has had in New York under lease, say, since the 1st of December, 1920—or referring particularly to Pier 86, North River, New York, and Pier 19, Staten Island, I will ask you whether your company had those under lease?

A. We had.

[fol. 165] Q. For a term of years?

A. Pier 86 not for a term of years but from a month to month basis, and Pier 19 for a term of years.

Q. Was your company the lessee of those two piers, Pier 19, Staten Island, and Pier 86, North River, in the month of December, 1920?

A. Yes.

Q. And in November, 1920?

A. I won't be sure about Pier 86 in November; I don't have that lease in my mind exactly when it began and when it ended, but Pier 19 yes.

Q. You had both piers in the month of December?

A. Yes. I can refer to the record I have here and find out definitely about that.

Q. What can you say as to whether or not either or both of those piers were available for use by such a steamer as the Poznan on the 1st of December, 1920, and throughout the month of December?

Mr. Feild: I object to that.

The Commissioner: Do you know anything about the steamer Poznan at all, its size?

Mr. Betts: Leave out the reference to the Poznan in the question.

A. I can refer to the record here and tell what was on the pier.

The Commissioner: Do you still object to the question, Mr. Feild, with the Poznan eliminated?

Mr. Feild: I object to the evidence that that pier was available for rent, that those piers were vacant—I judge that was to be the form of the question.

[fol. 166] The Commissioner: That is the same objection you made, then?

Mr. Feild: Yes, as incompetent, irrelevant and immaterial and not within the scope of the reference.

The Commissioner: I will allow it subject to the objection and take it for what it is worth.

The Witness: I am not familiar with this record, but I have someone with me who is familiar with it.

Mr. Feild: If the witness says he is unfamiliar with it, I object to it as evidence to refresh his recollection. If he wishes to offer the book in evidence he may do so.

Q. Can you testify after you have refreshed your recollection from the entries in the book?

A. I can testify what ships were at those piers on the day you asked about in the question, and knowing the capacity of the dock I can only tell you about what was left for another ship, that is all.

Q. See if you can refresh your recollection.

A. (Witness refers to book.) As far as I can see from this record, there was one ship at Pier 19 on December 1, 1920.

Q. Was there any ship at Pier 86, North River?

A. Yes, there was on December 1st: The steamer Northumberland was there November 22 to December 12. The steamer Inoco was there from November 6 to December 8, and the Satsuma Maru was there at Pier 86, North River, from December 1 until December 22.

Q. Several witnesses have stated that these two piers, 86, North River, and 19, Staten Island, would have been suitable piers for the steamer Poznan to discharge at in [fol. 167] December, 1920. Can you tell us what available space there was, first on Pier 86 and then Pier 19, on December 20, giving us the size of the pier and how many

steamers it would accommodate, say, between 400 and 500 feet long?

A. Pier 86 is about 1,000 feet long and I should say, although I am not quite sure, that it is 150 feet wide; it has two decks, and we were always, considering the amount of cargo and the character of the cargo, able to load or discharge four steamers. I can't say exactly from this record here how much space was available on the pier at that time. Part of the time there were apparently three steamers there; therefore we assume there would be space for one more vessel.

Q. You say the pier was 1,000 feet long and had two decks; that means, does it not, that there were two floors to the pier?

A. Yes.

Q. And that would give you twice the space a single-deck pier would give you?

A. Twice the area for cargo, yes.

Q. That applies to Pier 86. Taking Pier 19, I think you said there was one steamer at Pier 19 on December 1st?

A. Yes, I think there was one steamer there. Pier 19 is a little over 1,100 feet long and about 125 feet wide, and with the exception that it has no second deck, but we could accommodate, always considering the amount of cargo to be loaded or discharged, four steamers there.

Q. Then there was space available for three steamers at Pier 19?

A. There were berths for three steamers alongside the pier, yes.

Q. And for one steamer at Pier 86?

A. One steamer at Pier 86, yes.

Q. That is, throughout the month of December, 1920?

A. Yes.

[fol. 168] Q. And were those berths for rental at that time? Was your company willing to rent them at that time?

Mr. Feild: I make the same objection.

A. We did rent them.

Q. You rented those berths as steamers applied for them?

A. Yes.

Q. What was the charge per day of a section of either of those piers, a berth for a vessel?

A. About \$250.00 a day.

Q. And that gave her the use of a length of between 500 and 550 feet, did it?

A. Yes.

Q. What part of the width of the pier did it give her?

A. Half the width of the pier.

Q. That would be about 65 feet, would it?

A. About 65 feet, yes.

Q. Then if a steamer took two sections of the pier what was the regular charge for that?

A. It was twice the price—\$500.00.

Q. That would give it the length of 500 or 550 feet, according to which pier it was, and then the full width, across the pier, both sides?

A. Yes, half the pier, lengthwise, or half the pier by width.

Q. They could take their choice?

A. Yes, depending upon conditions.

Q. Is Pier 86 where the Leviathan docks now?

A. Yes.

Q. In case of very broad piers, as your piers are, where one side is taken by one steamer and another side taken by another steamer, do you customarily reserve sufficient space for a driveway in and out—is there room for trucks to pass each other going down the pier?

A. I cannot answer that definitely except from what I have seen on the piers. It would depend entirely on the [fol. 169] condition of the cargo on the pier at that particular time. I have sometimes seen it when there has been room for two trucks to pass, otherwise it would be necessary to back the truck in order to get out without turning.

Q. Is it clear, then, that you had one berth available at Pier 86 and three berths at Pier 19?

A. Yes, but I want to look over this Pier 19 record again to make sure.

## Cross-examination.

By Mr. Feild:

Q. Were either of these piers under contract for future occupancy; were they let for any future date?

A. Not that I know of.

Q. As I understand it, you are speaking now of their being vacant and available through the month of December; then they were not let for any future date?

A. Not that I can tell you from these records. That would be a question of memory.

Q. Do you make all the contracts for your company—could any contracts have been made without your knowledge?

A. I made all the pier contracts. I leased the space on the pier as it was available, yes.

Q. What is customary when a ship is going to arrive, does the owner wait until it arrives in the harbor here before he secures berthing space and dockage for it?

A. No, sir, it is not customary to wait.

Q. He usually secures that in advance?

A. Yes.

Q. How long in advance usually?

A. I should say that a week or ten days would be a reasonable time, but it would depend upon conditions.

Q. Do I understand, then, if the owners of the Poznan had applied to you, say, on the 20th of November—some [fol. 170] time between the 20th of November and the 1st of December—for space at one of these piers, that you could have made a contract with them for it beginning December 1st?

A. I can't tell you that without knowing the conditions on, we will say, the 20th of November. At that time it was customary for me to say that in a week or ten days we will probably have certain space. I can't tell from my memory now.

Q. Can you tell me whether these vacant berths, about which you have been speaking, were vacant say between the 20th of November and the 1st of December?

A. From this record I can give you what ships were at those piers during that time.

Q. Refresh your recollection and tell me when these berths became vacant?

A. (Referring to record.) On November 20 at Pier 19 there were three ships and at Pier 86 there were two ships.

Q. You say these berths were occupied on November 20; can you tell me when these berths which these steamers to which you have just referred occupied, were vacated?

A. One on November 27 and the other on November 23 and the third on December 9, that is Pier 19. Pier 86, one was vacated on November 30 and the other on December 8.

Q. November 30 and December 8 that was at Pier 86?

A. Pier 86, yes.

Q. When those berths were vacated was any of their cargo left on the pier?

A. I think not, although I can't say from this record.

Q. Were these vessels there for the discharge of cargo?

A. I can tell you that, I think, from this record.

Q. Whether they were discharging or loading?

[fol. 171] A. The record does not show whether they were discharging. The Satsuma Maru is the first one; it does not show whether it was loading or discharging. There is a notation here, "Section cleaned up," that evidently means there was no more cargo on the pier at that time. The next one, there is no notation on here whether it was discharging or loading, and I assume that the section was cleaned up because there is no record appearing against that ship, whether or not the ship had sailed prior to the date given here or whether this is the date the cargo was cleaned off.

Mr. Feild: I object to the witness assuming. If the witness does not know the facts let him so state.

Mr. Betts: I object to that because the witness can give inference from the course of business and the way the book was kept.

Q. Is that record supposed to show when the section is cleared up in every instance?

A. I couldn't say definitely; I can only say from inference.

Q. Did you make any effort to secure vessels to occupy these vacant berths?

A. Did I personally, or the company?



Q. You personally or the company?

A. Yes, I did through brokers.

Q. Did you advertise the space?

A. No.

Q. Did you bring it in any way to the special attention of the Polish-American Navigation Corporation or the Acme Operating Corporation or the New York Dock Company that these berths were open?

A. No.

Q. Did either of them apply to you for berth?

A. I don't remember.

[fol. 172] By Mr. Betts:

Q. Do you know whether these piers were well known among the steamship trade?

A. Yes, I should think they were known.

Q. Were they among the largest piers in the New York harbor?

A. Yes.

Q. From looking at your book you found out that Pier 86 was under your control in November, 1920; you just mentioned a ship being there in November?

A. Yes.

Q. Even if there had been some cargo left on the pier from these ships you have mentioned but as to which there is no mention made in the book, would there still have been room on the pier for a ship to discharge her cargo in the berths you have mentioned as being empty on the 1st of December?

A. Yes, I should think so.

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#### STIPULATION OF FACTS

It is stipulated, to avoid the necessity of producing the necessary witnesses and documents, that the Steamship Poznan sold at Marshal's sale under the consolidated libel of Davis et al. against the Steamship Poznan for the sum of \$253,000 gross, on April 25, 1922. From that amount had to be deducted the Marshal's cost of \$17,972.14. Since the Polish-American Navigation Corporation and the Acme

Operating Corporation proved not to be financially responsible, by an agreement entered into between all the consolidated libellants dated October 10, 1922, the hearing before Judge Lacombe was terminated after five of the consolidated libellants had proved claims aggregating approximately \$440,000. By such agreement, all the consolidated [fol. 173] libellants agreed that the recovery under the final decree on behalf of the libellants, who had proved their claims before the Commissioner, should be paid to the trustees and distributed by the trustees in accordance with the orders of a committee of six proctors selected by all the consolidated libellants acting pursuant to the agreement. The committee found the total claims of all the libellants to be approximately \$1,216,000, and up to date have ordered the payment of a dividend of 17 per cent of each libellant's claim as finally allowed by the committee. After payment of this dividend, the balance remaining in the hands of the trustee is approximately \$38,000, of which \$20,000 is agreed to be held to secure the claim of the New York Dock Company in accordance with stipulation dated November 25, 1922. The purpose of the foregoing was to save the expense of establishing all the claims in court. None of the consolidated libellants has recovered anything from either the Polish-American Navigation Corporation or the Acme Operating Corporation.

Reference closed.

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[fol. 174] IN UNITED STATES DISTRICT COURT

[Title omitted]

#### COMMISSIONER'S REPORT

By the order entered in the above cause and dated July 13, 1923, it was referred to me as Special Commissioner to take the proof and report upon the following facts:

(1) The reasonable value of the benefit enjoyed by the libellants in the consolidated cause from the wharfage furnished the SS. Poznan and her cargo by the libellant herein from December 2, 1920, to February 18, 1921, inclusive.

(2) The amount remaining unpaid on such amount.

(3) The reasonable value of the benefit similarly enjoyed between February 18, 1921, and March 11, 1921, if any, together with the reasons why the vessel lay there during that period.

(4) The reasonable value of any added benefit received [fol. 175] by the libellants in the consolidated cause during those periods from incidental services rendered by the libellant herein.

I hereby report that on July 23, 1923, and various subsequent dates, the proctors for the libellant and proctors for John B. Harris Co., intervenor, and the other libellants in the consolidated cause of Joseph H. Davis against the steamship *Poznan* and Polish American Navigation Corporation and Acme Operating Corporation, attended before me and presented testimony which, with the exhibits, is filed herewith. The parties have entered into an agreed statement of facts, to which reference is made.

I further report as follows:

## I

"The reasonable value of the benefit enjoyed" means the reasonable value of the wharfage furnished by the libellant to the steamship *Poznan* and her cargo from December 2, 1920 to February 18, 1921, inclusive. In this case there is no distinction between the expression "benefit enjoyed" and "value of the benefit enjoyed." The expressions are practically interchangeable and mean the value of the use of the wharf. That the wharfage furnished was reasonably worth \$250 per day from December 2, 1920 to February 18, 1921, both inclusive, and amounting to \$19,750, and \$250 per day from February 18, 1921 to March 11, 1921, inclusive, amounting to \$5,250 is amply supported by the testimony of the witnesses Hoagland (p. 5), Baker (p. 32), Firth (pp. 46-47), and Holly (pp. 114-115). There has been no evidence produced that such amount was excessive. [fol. 176] I therefore find and report that "the reasonable value of the benefit enjoyed" by the libellants in the consolidated cause amounted to \$19,750.

## II

The amount remaining unpaid on such amount is \$10,250 principal, the difference between \$19,750 and \$9,500 admitted to have been received (Stipulated Facts, p. 3).

## III

The reasonable value of the benefit similarly enjoyed by the libellants between February 18, 1921 and March 11, 1921 is \$250 per day, amounting to \$5,250.

The steamship Poznan lay at Pier 6 during this period because:

(1) The application of the Acme Operating Corporation, to remove the steamship Poznan from Pier 6 was denied by order of this Court dated January 5, 1921.

(2) The libellant herein requested the Marshal to remove the steamship, with which request the Marshal refused or failed to comply (Stipulated Facts, pp. 5 and 6).

(3) The libellants in the consolidated cause failed to request the Court or the Marshal to move the vessel.

(4) The Cargo Owners Committee objected to having it removed to another pier.

[fol. 177] The witness Day, Chairman of the Cargo Owners Committee, testified as follows at page 67:

“Q. Did the Cargo Owners at any time take steps to have the Poznan moved to another pier?

A. Oh we took steps to object to having it moved to another pier.

Q. You objected to having it moved?

A. I did, yes sir, I believe that was the Committee's opinion, not to have it moved to another pier.”

## IV

The reasonable value of any added benefit received by the libellants from incidental services rendered by the libellant herein amounts to \$1,128.70.

This item is made up of \$805 for lights and \$323.70 for pier cleaning charges. The rendition of these services and the prices to be paid therefor are admitted in the agreed statement of facts, page 2, and that the prices charged were reasonable and proper is amply supported by the testimony (Hoagland, pp. 10 and 11; Baker, p. 34; Firth, pp. 47 and 48). There is no testimony to show that these amounts are excessive.

Pier 6 was used by the Poznan. By using it, the Poznan delivered her cargo and the delivery of the cargo was not only a benefit to the vessel, but to the libellants in the consolidated cause who were thus enabled to obtain possession of their property, worth nearly \$2,000,000, which was in the possession of insolvent parties with a rapidly falling market. The New York Dock Company, without fault on its part, was deprived of the use of its property during the time the Poznan and her cargo used the pier.

[fol.178] I therefore report that the balance now due New York Dock Company, for such wharfage and incidental service furnished the Steamship Poznan and her cargo and the benefit therefrom enjoyed by the libellants in the consolidated cause, is the sum of \$16,628.70, with interest on \$17,128.70 from March 11, 1921 to December 16, 1921, and thereafter on \$16,628.70.

All of which is respectfully submitted.

Dated New York, May 1st, 1924.

Henry E. Mattison, Special Commissioner.

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IN UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTIONS TO COMMISSIONER'S REPORT—May 23, 1924

The intervenor, John B. Har is Company, hereby excepts to the report of the Commissioner, made herein and by him filed the 5th day of May, 1924, for the following causes, that is to say:

First. Because the commissioner has found (Report, p. 2) that the reasonable value of the benefit enjoyed by the

[fol. 179] libellants in the consolidated cause of Joseph H. Davis against the SS. Poznan, her engines, etc., in whose behalf the above named John B. Harris Company intervened, meant the open market value of Pier 6, Brooklyn, contrary to the directions contained in the decree dated July 13th, 1923, and the two opinions handed down by Judge Learned Hand dated March 23rd, 1923 and July 13, 1923, under which this cause was referred to the commissioner for report.

Second. Because the commissioner failed to distinguish between wharfage as embracing only protection or safe-keeping of the ship from wharfage as embracing such protection, and in addition supplying a place for the discharge of cargo, contrary to the directions contained in the decree dated July 13th, 1923, and the two opinions handed down by Judge Learned Hand dated March 23rd, 1923 and July 13, 1923, under which this cause was referred to the commissioner for report.

Third. Because the commissioner found (Report, pp. 2 and 3) that the reasonable value enjoyed by the libellants in the consolidated cause, amounted to \$19,750, although the testimony shows (Stenographer's Minutes, pp. 54, 64, 122, 123, 124 and 125) that the consolidated libellants suffered a detriment rather than a benefit.

Fourth. Because the commissioner has found (Report, p. 3) that the reasonable value of the benefit enjoyed by the consolidated libellants between February 18th, 1921 and March 11th, 1921, amounted to \$5,250, which was at the same rate of \$250 a day as charged for the period before [fol. 180] discharge of the ship, and was contrary to the directions contained in the decree dated July 13th, 1923, and the two opinions handed down by Judge Learned Hand dated March 23rd, 1923 and July 13, 1923, under which this cause was referred to the commissioner for report, although the evidence showed:

(1) (Additional Statement of Facts.) That the order dated January 5th, 1921, signed by Augustus N. Hand denied the application of the Acme Operating Corporation to move the vessel, but granted leave to renew the application in eight days.

(2) (Original Agreed Statement of Facts, pp. 5 and 6.) No refusal of the Marshal to comply with the request to remove the steamship. .

(3) (Additional Statement of Facts.) That the order dated January 5th, 1923, recited that the cargo owners committee only asked that the discharge of the vessel be suspended for one week, so that their objection would not operate.

Fifth. Because the commissioner found that the added benefit received by the libellants from incidental services, amounted to \$1,128.70, contrary to the directions contained in the decree dated July 13th, 1923, and the two opinions handed down by Judge Learned Hand dated March 23rd, 1923 and July 13th, 1923, and although the evidence showed (Stenographer's Minutes, p. 80) that none of the incidental services rendered, hastened the discharge of the vessel.

Sixth. Because the commissioner found the sum of \$16,628.70 to be due the libellant, with interest on \$17,128.70 from March 11th, 1921 to December 16th, 1921, and thereafter on \$16,628.70, although the evidence shows (Original [fol. 181] Agreed Statement of Facts, p. 3) that payments were made by the Polish-American Navigation Corporation as late as December 16th, 1921, before which time no interest was charged.

Dated New York, May 23rd, 1924.

Hunt, Hill & Betts, Proctors for Intervenor, John B. Harris Company.

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IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION—June 11, 1924

AGUSTUS N. HAND, District Judge:

The judge who granted the interlocutory decree awarded to the libellant as a preferential lien "the benefit which the libellants (consolidated) received from the services rendered." He also said: "Normally reasonable wharfage

[fol. 182] will be a proper measure of the benefit received,  
 \* \* \* I have drawn a decree which merely directs the commissioner to ascertain what benefit the libellants received from the use of the wharf."

The commissioner found that: "The reasonable value of the benefit enjoyed means the reasonable value of the wharfage furnished by the libellant to the steamship Poznan."

It is contended by the intervenor representing cargo owners that the cargo owners should pay nothing further than what has already been allowed because if the ship had been moved to another berth more fitted for her discharge the unloading would have been accomplished without the loss occasioned by the cramped facilities offered at the libellant's pier. This is not a sound argument against the wharfinger. It was not the latter's fault that the ship was not removed from the pier in question. The cargo owners opposed a motion of the owner and the charterer of the ship to remove her. The question is not whether some other pier was better. The ship was at the libellant's pier and the cargo owners kept her there. They received the benefit of shelter and discharge from the use of libellant's property. I can conceive of no reasonable measure of this benefit except the reasonable value of the particular wharfage enjoyed and the incidental services rendered. There was no duty upon the wharfinger as in *The St. Paul*, 271 Fed. 265, to remove the ship to a less expensive place. The committee of cargo owners seem to have objected to the removal of the Poznan (Minutes, p. 67).

The report of the commissioner is confirmed and the exceptions are overruled.

A. N. H. D. J.

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[fol. 183] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINAL DECREE—JUNE 17, 1924

John B. Harris Company having intervened herein by the order of this Court; and this cause having been heard on the pleadings and proof, and the advocates for the libellant



and the intervenor respectively being heard, and due deliberation being had; and the Court having filed its decision dated March 23, 1923, and having thereafter filed its supplemental decision dated July 13, 1923; and the Court by an order made and entered on the 13th day of July, 1923, having referred this cause to Henry E. Mattison, Esq., Special Commissioner, to take proof and report upon certain facts; and the said special commissioner having filed his report herein in the office of the Clerk of this Court on the 5th [fol. 184] day of May, 1924, and a true copy of said report, together with a written notice of the time and place of filing same having been duly served on Hunt, Hill & Betts, Esqrs., proctors for the intervenor and sundry other libellants in the consolidated cause of Joseph H. Davis against the Steamship Poznan and Polish-American Navigation Corporation and Acme Operating Corporation instituted in this Court; and proof of such service having been duly filed herein on May 12, 1924; and the intervenor having filed exceptions to said report on or about May 23, 1924, and the libellant, on May 27, 1924, having moved for an order confirming said report in all respects and for a final decree in accordance therewith; and the advocates for the libellant and the intervenor respectively being heard and due deliberation being had; and the Court having filed its decision on said exceptions and said motion, dated June 11, 1924,

Now, therefore, on motion of Davies, Auerbach & Cornell, proctors for the libellant, it is

Ordered, that intervenor's exceptions to the report of Henry E. Mattison, Esq., Special Commissioner, filed herein, be, and the same hereby are, overruled and that said report be, and the same hereby is, confirmed in all respects.

And it appearing from said report that there is due to the libellant, for wharfage and incidental services, the principal sum of \$16,628.70, together with interest on the sum of \$17,128.70 from March 11, 1921 to December 16, 1921, and thereafter on the sum of \$16,628.70; and the costs herein having been taxed by the Clerk at \$408.75; and the said steamship Poznan, her engines, etc., having been heretofore sold by the order of this Court in the consolidated [fol. 185] cause of Joseph H. Davis against the Steamship Poznan, her engines, etc., et al. (75—316) instituted in this

Court, and the proceeds paid into this Court and deposited in the registry thereof; on the like motion, it is

Further ordered, adjudged and decreed, that New York Dock Company, the libellant herein, recover in this cause the principal sum of Sixteen thousand six hundred and twenty-eight and 70/100 dollars (\$16,628.70), together with interest on the sum of Seventeen thousand one hundred and twenty-eight and 70/100 dollars (\$17,128.70) from March 11, 1921 to December 16, 1921, and thereafter, to the date of this decree, on the sum of Sixteen thousand six hundred and twenty-eight and 70/100 dollars (\$16,628.70), amounting in all to the sum of \$19,916.66, together with the further sum of \$408.75 costs as taxed, making a total of \$20,325.41; and it is

Further ordered, adjudged and decreed, that the said sum of \$20,325.41 is a prior lien upon the proceeds of the sale of said vessel heretofore deposited in the registry of Court, and is hereby directed to be paid and discharged in full out of said proceeds in priority and preference to any payment from said proceeds to John B. Harris Company, the intervenor herein, or to the libellants in the said consolidated cause of Joseph H. Davis against the Steamship Poznan, her engines, etc., et al., or to either of them; and it is

Further ordered, adjudged and decreed, that New York Dock Company, the libellant herein, recover of said John B. Harris Company, intervenor, such part of the costs heretofore or hereafter taxed herein as shall not be satisfied from the proceeds of said vessel.

Augustus N. Hand, D. J.

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[fol. 186] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

SIRS: Please take notice that John B. Harris Company intervening herein in its own behalf and that of the other libellants in the consolidated cause of Joseph H. Davis libellant against the SS. Poznan, Acme Operating Corpora-

tion and Polish American Navigation Corporation respondents hereby appeals to the United States Circuit Court of Appeals, Second Circuit, from the interlocutory decree, dated July 13th, 1923 and the final decree, dated June 17, 1924 of this Court, entered in the office of the Clerk of the United States District Court, Southern District of New York on the same respective dates and from each and every part thereof.

Dated New York, July 24, 1924.

Yours, etc., Hunt, Hill & Betts, Proctors for John B. Harris Company, Intervenor, and other libellants in the consolidated cause.

Office and P. O. Address, 120 Broadway, Borough of Manhattan, New York City.

[fol. 187] To Alex. Gilchrist, Jr., Esq., Clerk of the United States District Court, Southern District of New York; Davies, Auerbach & Cornell, Esqs., Proctors for Libellant, 34 Nassau Street, New York City.

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#### IN UNITED STATES DISTRICT COURT

[Title omitted]

#### ASSIGNMENTS OF ERROR—July 24, 1924

John B. Harris Company, Intervenor herein, hereby assigns error in the rulings, proceedings, decisions and interlocutory and final decrees of the District Court herein as follows:

First. In that the District Court did not dismiss the libel of the New York Dock Company with costs.

Second. In that the said Court decreed that the libellant, New York Company, had an equitable lien upon the proceeds of the sale of the SS. Poznan in the consolidated suit of Joseph H. Davis against the SS. Poznan et al., for the value of its wharfage and incidental services rendered to the said libellants in said cause in priority to the prior maritime liens against such proceeds of said libellants in said consolidated suit.

Third. In that said Court did not decree that the maritime liens of the Intervenor and the other libellants in the said consolidated cause were superior and to be preferred in payment to any lien that libellant herein may have had.

Fourth. In that the said Court decreed that the libellant, New York Dock Company, had an equitable claim for its wharfage and incidental services against the lienors' (Consolidated libellants) own rights in the vessel arising after she was in custody and that it was a lien on their liens.

Fifth. In that the Court decreed that the liens of the lienors (Consolidated libellants) had been benefited by the use of libellant's pier.

Sixth. In that the said Court did not decree that the only wharfage which the libellant was entitled to was that measured by the amount of service rendered for protection or safekeeping the ship.

Seventh. In that the said Court did not decree that the measure of the protection or safekeeping mentioned in the sixth assignment of error herein was evidenced by the amount paid by the marshal for the safekeeping of the same vessel at another pier after the wharfage service had been rendered by the libellant herein.

[fol. 189] Eighth. In that the said Court decreed that the libellant had a prior lien for lights and other incidental services charged for by the libellant, despite the fact that the testimony showed (S. M., p. 80) that none of the incidental services rendered hastened the discharge of the vessel or were reasonably necessary for her protection.

Ninth. In that the said Court did not decree that the \$9,500 paid to the libellant by the Polish American Navigation Corporation, the owner of the ship, was more than sufficient to pay for the services rendered to the ship or the libellant's interests therein, by the libellant.

Tenth. In that the said Court decreed that the reasonable value of the benefit enjoyed by the consolidated libellants meant the reasonable value of the wharfage in the open market as furnished by the libellant to the SS. Poznan.

Eleventh. In that the said Court decreed that the libellants in the consolidated cause had received a benefit

rather than a detriment from the use of the pier of the New York Dock Company.

Twelfth. In that the said Court decreed that the libellant New York Dock Company was entitled to recover the sum of \$16,628.70 with interest on the sum of \$17,128.70 from March 11, 1921 to December 16, 1921 and interest on the sum of \$16,628.70 from December 16, 1921 to June 17, 1924, totalling \$19,916.66, despite the fact that the evidence showed (original agreed statement of facts, page 3) that payments were made by the Polish American Navigation Company as late as December 16, 1921, before which time no interest was charged.

[fol. 190] Thirteenth. In that the said Court awarded the sum of \$408.75 costs to the libellant herein.

Fourteenth. In that the said Court decreed that the total sum awarded to the libellant of \$20,325.41 was and is a prior lien upon the proceeds of the sale of the SS. Poznan, and directed that the said amount be paid and discharged in full out of such proceeds in priority and preference to any payment from such proceeds to John B. Harris Company or the other libellants in the consolidated cause on account of their maritime liens.

Fifteenth. In that the said Court decreed that the libellant New York Dock Company was entitled to recover from the said Intervenor such part of the costs taxed before or after the decree as should not be satisfied from the proceeds of sale of said vessel.

Sixteenth. In that the said Court decreed that the reasonable value of the benefit enjoyed by the consolidated libellants between February 18, 1921 and March 11, 1921 amounted to \$5,250 at the same rate of \$250 per day as was charged for the period before the discharge of the ship on the ground that the libellants in the consolidated cause had objected to the removal of the ship from the pier of the New York Dock Company, despite the fact that the evidence showed:

(1) (Additional Statement of Facts.) That the order dated January 5, 1921, signed by Judge Augustus N. Hand denied the application of the Acme Operating Corporation

to remove the vessel, but granted leave to renew the application in eight days.

[fol. 191] (2) (Original Agreed Statement of Facts, pages 5 and 6.) That there was no refusal on the part of the marshal to comply with the request to remove the steamship.

(3) (Additional Statement of Facts.) That the order dated January 5, 1923, recited that the cargo owners committee only asked that the discharge of the vessel be suspended for one week, so that their objections would not operate beyond that time.

Dated New York, July 24, 1924.

Hunt, Hill & Betts, Proctors for John B. Harris Company, Intervenor, and other libellants in the consolidated cause.

Office and P. O. Address, 120 Broadway, Borough of Manhattan, New York City.

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[fol. 192] IN UNITED STATES DISTRICT COURT

STIPULATION RE TRANSCRIPT OF RECORD—October 21, 1924

[Title omitted]

It is hereby stipulated and agreed, that the foregoing is a true copy of the transcript of the record of the said District Court in the above entitled matter as agreed on by the parties, and the Exhibits offered in evidence before the Commissioner referred to on Pages 163, 164 and 165, but omitted from this transcript, may be presented and referred to by counsel with the permission of the Court at the hearing of this appeal.

Dated, October 21st, 1924.

Davies, Auerbach & Cornell, Proctors for Libellant.  
Hunt, Hill & Betts, Proctors for John B. Harris Company, Intervenor, and other libellants in the consolidated cause.

[fol. 193] Clerk's certificate to transcript of record from District Court omitted in printing.

[fol. 194] IN UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Before Rogers, Hough, and Manton, Circuit Judges

NEW YORK DOCK COMPANY, Libellant-Appellee,  
against

"S. S. POZNAN," Her Engines, Boilers, etc., JOHN B. HARRIS COMPANY, Intervenor-Appellant

Davies, Auerbach & Cornell, for Libellant-Appellee;  
Charles E. Hotchkiss, Alexander J. Feild, Advocates.

Hunt, Hill & Betts, for Intervenor-Appellant; Geo. Whitefield Betts, Jr., Mark W. Maclay, Edna F. Rapallo, of Counsel.

OPINION

This cause comes here on appeal from the United States District Court for the Southern District of New York.

It is an appeal from a final decree entered in favor of the libellant on June 17, 1924, in the amount of \$16,628.70, with interest.

[fol. 195] The libel was filed against the steamship and her owners, and claimed a lien in the sum of \$17,462.03. It asserted that the amount named was a reasonable and customary charge for certain services of wharfage and berthage given to the SS. Poznan by the libellant in the City of New York on the request of the master of the vessel, to whom its management was entrusted. The libel alleged that the steamship remained at libellant's wharf or wharves from December 1, 1920, until March 12, 1921—being in all a period of 101 $\frac{1}{4}$  days. The New York Dock Company is hereafter referred to as the Dock Company.

The time to answer this libel expired without appearance having been made for the vessel, and a default decree was entered. Thereafter the intervenor-appellant, John B. Harris Company, a cargo owner who had libeled the Poznan (hereafter referred to as the intervenor) applied for and obtained leave to intervene and defend.

During September, 1920, and prior to the wharfage services alleged in the libel, the steamship, a vessel of 8,405.72

gross, 5,298 net and 11,250 deadweight tons, registered at the port of New York and owned by the Polish American Navigation Corporation but under charter to the Acme Operating Corporation, loaded at the port of New York a general cargo for transportation to Havana, Cuba. The cargo, however, was not delivered by the vessel at Havana, but was returned on the vessel to New York, where she arrived and docked at the pier of the Dock Company on December 2, 1920, or one day after the libel alleges the [fol. 196] wharfage began. On the same day and after the vessel had docked she was arrested by and taken into the possession of the United States Marshal for the Southern District of New York. Thereafter numerous libels were filed against the vessel for damage to cargo and for failure to deliver cargo in Havana, the majority of said libels being filed before that of the Dock Company. These actions of the various cargo owners were consolidated in one cause, entitled Joseph H. Davis against SS. Poznan, Acme Operating Corporation (the charterer) and Polish American Navigation Corporation (the owner), and thereafter an interlocutory decree was entered therein against all three and a reference directed to a Commissioner. Subsequently the vessel was sold by the Marshal under this consolidated libel for the sum of \$253,000 gross. As neither the owner nor the charterer proved to be financially responsible, in order to save expense, an agreement was entered into between all the consolidated libelants, terminating the hearings before the Commissioner after sufficient claims to exhaust the fund had been proved, and agreeing that the recovery under the final decree on behalf of the libelants who had proved their claims should be paid to the Trustees and by them distributed in accordance with the orders of a committee of six proctors, selected by the libelants. The committee found the total sum due all libelants to be approximately \$1,216,000, and up to the date of the reference in this action had ordered payment out of the fund of a dividend of 17% [fol. 197] on each libelant's claim, leaving a balance of approximately \$38,000 of which \$20,000 was to be held to secure the Dock Company's claim.

On November 30, 1920, the Dock Company and the Polish American Navigation Corporation entered into an agreement for the use of the Dock Company's pier by the



ship, the Polish-American Navigation Corporation agreeing to pay therefor \$250 per day to commence from 7 A. M. December 1st, 1920, and to continue up to the time the steamer left and all cargo was removed, and in addition for lights, for cleaning the pier and for carting dirt at agreed rates. This agreement was not made with the master of the ship and was made previous to the arrival of the vessel in New York. The Polish-American Navigation Corporation made payments to the Dock Company under the contract. The payments totalled \$9,500 and left a balance unpaid amounting to \$16,962.03. The cargo was completely discharged from the vessel at 2 P. M. February 18, 1921, and the delivery of the cargo from the pier was completed March 1st, 1921, the vessel remaining fast to the pier until March 11th. On December 9, 1921, no payment having been made by the Polish-American Navigation Corporation on account of the wharfage since February 22, 1921, an agreement was entered into by the Navigation Company and the Dock Company whereby the latter Company agreed not to press its claim for the sale of the ship providing the outstanding charges for wharfage were paid by the Navigation [fol. 198] Corporation in certain installments as set forth in the agreement. The Navigation Corporation made the initial payment of \$500 under this agreement on December 16, 1921, but no further payment was made thereafter, although prior thereto \$9,000 had been paid by it.

On January 6th, 1921, nearly a year previous to the agreement above referred to between the Dock Company and the Navigation Corporation and the payment of \$500 thereunder, the Dock Company presented to the United States Marshal a bill for the wharfage and charges then due, together with a letter stating that the bill represented charges against the ship to the date of the letter and that charges would continue to accrue as long as the vessel remained there, and that in case there was any question as to the Marshal's liability the Dock Company wished to be advised immediately. The following day the Dock Company wrote another letter to the Marshal explaining that the steamer's wharfage charge included in the bill covered not merely the right to make fast to the pier but also the use of the Company's pier for discharging and storing cargo.

On January 7, 1921, the Dock Company received from the Marshal a reply in which it was said:

"The Marshal does not and will not assume liability for any charges against this vessel, until so directed by order of the court."

After the decree was entered against the ship in the consolidated libel suit, the Dock Company requested the United [fol. 199] States Marshal to include its claim for wharfage as part of the bill of costs submitted by the Marshal, and this was done. Upon objection this item was struck out by the United States District Court Clerk, whose action was confirmed by the Court without prejudice to the right of the Dock Company to claim against the proceeds of the vessel and an order to this effect was made on June 6, 1922. No appeal has been taken from this order.

The action came on for trial before the District Judge and on March 23, 1923, he handed down an opinion in which he found that no maritime lien for wharfage arose because the vessel was in the custody of the court; that nevertheless the appellee, which furnished the wharf, had an equitable claim on the fund (the price realized on the sale of the ship by the Marshal) though not a maritime lien on the ship, and in priority to the lienors, to protect whose liens the service was rendered; that the measure of recovery was the fair value of the wharf between December 2, 1920, and the time when the ship could first have been moved, which fair value would not necessarily be the contract price of the pier; that the lights and other incidental services were to be included; that the \$9,500 paid by the Polish American Navigation Corporation should be applied for as many days' wharfage at \$250 per day plus incidentals as it would cover; that if the parties could not agree upon the amount the issue would be referred to a commissioner. [fol. 200] On July 13, 1923, the District Judge handed down a supplemental opinion in which he said:

"The lien here established was an equitable lien against the lienor's own rights in the vessel arising after she was in custody."

He further said that the measure of the Dock Company's lien is the benefit which the consolidated libelants received

from the services rendered, which in his first opinion he assumed would be the reasonable value of wharfage.

The interlocutory decree provided that the Dock Company

"has an equitable lien upon the proceeds from the sale of SS. Poznan in the consolidated suit of Joseph H. Davis against the SS. Poznan in this court, for the value of its wharfage services rendered to the said libelants in said cause in priority to the prior maritime liens against such proceeds of the said libelants in said consolidated suit,"

and the Court appointed a Special Commissioner to take proof and report. Thereafter hearings were held before the Commissioner, and on May 1, 1924, he made his report, by which he found that the reasonable value of the benefit enjoyed by the consolidated libelants was \$16,628.70.

Exceptions to the Commissioner's report were duly filed by the intervenor, and after a hearing before the District [Vol. 201] Judge the report of the Commissioner was confirmed and the final decree was entered on June 17, 1923. It decreed that the Dock Company recover the amount as found by the Commissioner, and that such amount is a prior lien upon the proceeds of the sale of the ship in the registry of the Court, and is directed to be paid in full out of said proceeds in priority to any payment to the intervenor herein or to the consolidated libelants. An appeal was duly taken from said final decree and assignments of error were filed.

ROGERS, Circuit Judge:

The libel in this case was filed against the steamship Poznan by the Dock Company as the owner of a private wharf under a license issued by the City of New York. The libelant claimed that for wharfage services extended to the vessel there was due to it the sum of \$17,462.63 with interest. It asserted that demand of payment had been made, but payment had been neglected or refused. It prayed a decree for the amount named might be entered, and that the vessel might be condemned and sold to pay the demand.

It appears that prior to the filing of the libel above men-

tioned, the ship had been libeled by Joseph H. Davis and various other libelants including the John B. Harris Company. These libels were filed for breach of contract of affreightment. By order of the court they were consolidated into one suit which is hereinafter referred to as the consolidated cause. In that cause a decree was entered in favor of the libelants, the vessel was sold and the proceeds [fol. 202] were paid into the registry of the court. They were insufficient to satisfy the decree.

In the meantime the Dock Company had filed its libel (the instant case) which libeled the vessel for wharfage, and the John B. Harris Company intervened, excepted and later answered to protect its lien obtained in the consolidated cause.

The court below decreed in the instant case that the libelant, the Dock Company, should recover the sum of \$20,325.41. This amount included interest and costs. It ordered and decreed that this sum constituted a prior lien to that of the John B. Harris Company and the various other libelants in the consolidated cause who filed the earlier libel for breach of the contract of affreightment and who obtained the decree under which the Poznan was sold and which resulted in the deposit of the proceeds in the registry of the court. This decree was entered in the instant case on June 17, 1924.

At the time of this suit about \$240,000 was left in the registry, being the proceeds of the sale. It is agreed that the libels in the consolidated cause claim damages aggregating about \$1,700,000 and it is agreed that the actual provable damage will exceed the amount left in the registry of the court.

The John B. Harris Company, in its own behalf and that of the other libelants in the consolidated cause which had been previously commenced against the Poznan, appealed from two decrees entered in the suit now before the court. These were:

[fol. 203] 1. An interlocutory decree dated July 23, 1923, which decreed that the libelant (the Dock Company) had an equitable lien upon the proceeds in the registry for the value of its wharfage services, and that this equitable lien had priority to the prior maritime liens against such proceeds of the libelants in the consolidated suit.

2. The final decree of June 17, 1924, which decreed that the total sum due to the libelant (the Dock Company) including interest and costs amounted to \$20,325.41. And it further decreed that the aforesaid amount constituted a prior lien upon the proceeds of the sale of the ship deposited in the registry of the court, and it directed that the said amount should be paid "and discharged in full out of said proceeds in priority and preference to any payment from said proceeds to John B. Harris Company, the intervenor herein, or to the libelants in the said consolidated cause of Joseph H. Davis against the Steamship Poznan, her engines, etc., et al., or to either of them; and it is

Further ordered, adjudged and decreed, that New York Dock Company, the libelant herein, recover of said John B. Harris Company, intervenor, such part of the costs heretofore or hereafter taxed herein as shall not be satisfied from the proceeds of said vessel."

[fol. 204] The District Judge, disposing of the libel brought by the Dock Company, held that after the vessel was arrested no maritime liens arose against her and that in so far as the bill depended upon a maritime lien it failed. But he held that the Dock Company, which furnished the wharf, while it did not have a maritime lien on the ship, nevertheless had an equitable claim on the fund in the registry of the court, and that this amounted to an equitable lien against the lienors' (The John B. Harris Company and various other libelants) rights in the vessel arising after she was in custody. He held that it "was a lien on their liens justifiable in this court only because the Court had custody of the vessel under the arrest. That was the holding in *The St. Paul*, 271 Fed. 265. It was not necessary that the lienors should consent, though possibly a consent might here be spelled out. A lien may arise based upon equitable considerations when the circumstances are such that the owners have enjoyed a benefit which it would be unjust for them to retain at the expense of him who rendered the services." From that decision the John B. Harris Company, intervenor on its own behalf and that of the other libelants in the consolidated cause, has appealed.

It is therefore necessary for this court to determine whether the Dock Company's claim against the Poznan for the use of the wharf gave rise to an equitable lien which is entitled to priority over the lien of the John B. Harris Com-

pany and the other libelants in the consolidated cause, [fol. 205] whose liens arose out of a breach of contracts of affreightment.

No question is raised on this appeal as to the right of shippers to a lien on the ship for the performance of a contract of affreightment. It is a thoroughly established principle of the general maritime law that the vessel is liable in rem for the performance of its agreement for the transportation of goods—the goods having been laden on board. *The Bark Edwin*, 24 How. 386; *The Freeman*, 18 How. 182; *The Yankee Blade*, 19 How. 82; *The Hermitage*, 4 Blatchf. 474; *The Bark Winslow*, 4 Biss. 13; *The Flash*, 1 Abb. Adm. 67, 9 Fed. Cas. 252, Case No. 4857; *Scott v. The Ira Chaffee*, 2 Fed. 401. In the *Freeman* Case, *supra*, Mr. Justice Curtis said: “Under the maritime law of the United States the vessel is bound to the cargo, and the cargo to the vessel, for the performance of a contract of affreightment.” The right of a lien in such cases is recognized in *Osaka Shosen Kaisha v. Pacific Lumber Co.*, 260 U. S. 490, 499, where the court said:

“The contract of affreightment itself creates no lien, and this Court has consistently declared that the obligation between ship and cargo is mutual and reciprocal and does not attach until the cargo is on board or in the master’s custody. We think the lien created by the law must be mutual and reciprocal; the lien of the cargo upon the ship is limited by the corresponding and reciprocal rights of the ship owner upon the cargo.”

[fol. 206] And in *The Esrom*, 272 Fed. 266, 270, decided in this Court it was said: “But the lien of the vessel upon the goods and of the goods upon the vessel attaches from the moment the goods are laden on board.” That an action in rem lies against a vessel for breach of a contract of affreightment is not controverted in this case, and is not before this court.

The question which is here relates to wharfage. And it is not disputed in this case that wharfage accrues when a vessel makes use of a wharf for the purpose of receiving or discharging cargo or passengers, or as a place for mooring.

Wharves and piers are properly regarded as a necessity of navigation, and as indispensable for ships that they

may lie in port in safety, receive and land their passengers, as well as load and unload their freight. They are necessary for the safety and convenience of commerce and navigation and are as essential to commerce as are the ships that navigate the adjacent waters. And it has long been settled that wharfage charges constitute maritime liens. And in *Ex parte Easton*, 95 U. S. 68, 77, the Court said:

"Viewed in the light of these considerations, it is clear that a contract for the use of a wharf by the master or owner of a ship or vessel is a maritime contract, and, as such, that it is cognizable in the admiralty; that such a contract, being one made exclusively for the benefit of the [fol. 207] ship or vessel, a maritime lien in the case supposed arises in favor of the proprietor of the wharf against the vessel for payment of reasonable and customary charges in that behalf for the use of the wharf, and that the same may be enforced by a proceeding in rem against the vessel, or by a suit in personam against the owner."

And in *The Shrewsbury*, 69 Fed. 1017, 1020, District Judge Ricks states that "A lien for wharfage is made, under the general maritime law, a lien next in rank to wages." It is certainly a highly favored lien, but with its exact rank in the order of priority we are not now concerned.

A maritime lien, it has been often said, is a secret one which may operate to the prejudice of general creditors and purchasers without notice. It is therefore regarded *stricti juris* and cannot be extended by construction, analogy or inference, *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, *supra*; *The Yankee Blade*, 19 How. 82, 91.

It is a right of property and not a mere matter of procedure, *The Lottawanna*, 21 Wall. 558, 579. Lord Tenterden defined a maritime lien as a privileged claim upon a thing in respect of service done to it or injury caused by it, to be carried into effect by legal process. *Harmer v. Bell*, 7 Moore P. C. 267, 284. It is an appropriation of the ship as a security for a debt or claim. It is given by the law, and it gives the creditor a special property in the ship, [fol. 208] which subsists from the moment the debt arises and it gives him a right to have the ship sold that his debt may be paid out of the proceeds of the sale. It is a right in



the vessel, a *jus in re* Benedict's Admiralty Law (4th ed.) sec. 131.

Rights arising out of contract are maritime and so within the admiralty jurisdiction when they relate to a ship as an instrument of commerce, intended to be used as such or to facilitate its use as such. And a contract express or implied for wharfage furnished to a vessel is a maritime contract. And in 40 Cyc. 910, it is said that where wharfage is furnished "a lien arises therefore enforceable in admiralty, when the wharfage is furnished in the ordinary course of navigation. But no such lien arises where the vessel has been withdrawn from navigation and is kept at the wharf for the mere purpose of storage." So in 30 Am. & Eng. Encyc. of Law it is stated that where a vessel has been "withdrawn from commerce and navigation and is laid up at a wharf for storage, such wharfage does not constitute a maritime contract of which admiralty has jurisdiction."

But wharfage charges do not, under all circumstances, constitute a maritime lien. A maritime lien arises out of a maritime contract or out of a maritime tort. In order that a maritime lien may arise out of contract the service must in some way be brought into relation with the ship itself and tend to facilitate her use as an instrument of commerce.

In Hughes on Admiralty (2nd ed.) 22, it is said:

[fol. 209] "The same transaction may be maritime in one case and not maritime in another. As emphasizing this distinction, there is the maxim that 'a ship is made to plough the seas, and not to lie at the walls.' Hence, wharfage rendered to a ship while loading or unloading, or in her regular use as a freight-earning enterprise, is a maritime contract.

On the other hand, wharfage to a ship laid up for the winter while waiting for the season to open is not maritime."

The same distinction is illustrated by the cases which hold that watchmen on a vessel while in port during voyages are regarded as serving under a maritime contract, but those who have charge of her while laid up have not such



contract. *Erinagh*, 7 Fed. 231; *Fortuna*, 206 Fed. 573; *Hughes on Admiralty* (2nd ed.) 22.

And if a vessel is laid up for the season or for any reason is withdrawn from navigation a contract for wharfage is regarded as a nonmaritime one. *Benedict's Admiralty* (5th ed.) vol. 1, sec. 66.

If the vessel is in *custodia legis* she is for the time being withdrawn from navigation and no maritime lien arises for wharfage charges incurred during the period she is so withdrawn. Such a lien arises only when the wharfage is furnished in the ordinary course of navigation. In *The C. Vanderbilt*, 86 Fed. 785, District Judge E. B. Thomas of the Eastern District of New York held that the principle that a [fol. 210] maritime lien exists for wharfage is not applicable to wharfage furnished to vessels "while withdrawn from navigation." He said "A service furnished under such conditions is not within the fundamental reasons that have prompted the courts to award liens for wharfage, or for any other purpose. \* \* \* But if an empty ship be tied to a wharf, because her field of operation is closed by ice, or because she is taken away from navigation, the case is widely different. She is at the wharf for no purpose of navigation, but for the precise purpose of non-navigation, and because navigation is not contemplated. She is not at the dock for passengers, for freight, for repairs, or any purpose preceding or succeeding the actual voyage. She is not there for rest, even in the sense of lying up for some preparation for another voyage, or reparation from a voyage ended; but the sole reason of her presence at the wharf is that she has gone out of commission, withdrawn temporarily from navigation, abandoned for the time the purpose of her construction, because the locality of her journeying positively prohibits the continuance of such occupation, or because there is no occasion or opportunity for her use. The mariners are discharged, the boat is shut up, like a closed house, and is left in idleness to a caretaker or watchman, and so remains until the owner sees fit to withdraw her from this state of suspension for her appropriate use. Such an abandonment, such a complete isolation and disconnection with navigation, as this, bears no analogy to [fol. 211] any condition of a ship when a lien is allowed for a service rendered her. Would a watchman or caretaker be entitled to a lien for his services on a boat in such a situa-

tion? How would such watchman's services be equivalent to the services of a mariner? The services of a mariner could not be required in the nature of the case, for the mariner is an operative, and the boat in winter quarters is a dead thing, to whom a mariner would be useless. It is difficult to conceive of any act of man in connection with a ship, or any condition of a ship, unless it be one of permanent abandonment, so divorced from navigation as this laying up of a boat at the end of a season, and at the close of navigation, until it should be wanted again, or the taking of a boat out of commission at any time for the mere purpose of storage. \* \* \* But it will be found, upon investigation, that the principle of commercial activity on the part of a ship is always present when a lien is recognized for a service rendered her. Truly, she may be lying in apparent idleness at the dock; but she is indolent only in the sense that, in the matter of cargo or repairs or victualling or manning, she is making ready for her journey."

In *The Esteran de Anunano*, 31 Fed. 920, a Mexican vessel at New Orleans was seized by the sheriff of the parish of Orleans under a writ of sequestration obtained in a State Court on behalf of London bankers claiming the amount due under a mortgage. The court declared that when a vessel passed into the custody of the law it thereby terminated the authority of her owners and of their agents, the master and ship's husband to affect the ship by any [fol. 212] conduct or contract so as to give a lien on the ship.

In *The Augustine Kobbe*, 37 Fed. 696, it was held that a mate, who had served on a ship on a voyage from Mobile to South America and return, and which on its return was seized under process at Mobile, and who remained on the vessel after her seizure assisting the Marshal in looking after the vessel, had no maritime lien which he could enforce against the proceeds of the vessel for the period he served on the ship after her seizure. The court disposed of the claim by saying: "Of whatever merit the claim might be as a part of the Marshal's expenses, if recognized by him, it certainly is not a maritime claim to be enforced against the proceeds of the vessel."

In *The Mary K. Campbell*, 24 Blatchford, 475, 31 Fed. 840, Judge Wallace held that a wharfinger acquired no

privileged lien against a vessel seized by a sheriff under an attachment, and taken to and kept at the wharf at the instance of that officer. In *The Pulaski*, 33 Fed. 383, 384, it was held that to be the subject of an admiralty lien "the vessel must be at the time engaged in commerce and navigation, or in preparation therefor."

In *The Andrew J. Smith*, 263 Fed. 1004, it was said: "If the wharfage charge is not a part of the repair bill, then no maritime lien arises unless the services have been rendered to a boat maritime in character at the time."

In *The Philomena*, 200 Fed. 873, it was held that an engine [fol. 213] remaining on a vessel after it was taken out of the owner's control and while it was in custodia legis had no lien for wages during that time. His right to a lien was recognized up to the time of the seizure.

In *The Nissequoque*, 280 Fed. 174, 185, the District Judge said:

"After the marshal had taken the schooner into his custody on the 21st day of February, 1921, he was alone responsible for taking care of her. The master could not, by any contract or otherwise, confer upon the seamen a right to remain on the vessel and impose upon her a maritime lien for wages not earned at the date upon which she passed into the custody of the marshal."

In *The Asotria*, 281 Fed. 618, 621, the Circuit Court of Appeals of the Fifth Circuit said:

"Upon the merits, we are of opinion that there was no maritime lien in favor of the crew for wages after the vessel was placed in the custody of the law, except for the extra month's wages authorized by the statute \* \* \*."

In *Board v. Marine Lighterage Corporation*, 296 Fed. 146, 147, it is stated that for wharfage services "a maritime lien attaches to the ship in a home port if she is not out of commission or withdrawn from navigation."

A maritime lien arose out of the necessities of commerce. [fol. 214] The maritime law recognized the principle that in contracts with a ship the ship herself is bound to the performance thereof, the other contracting party being given a lien on the ship herself for breach of the contract. A ship visits places where her owners are not known. The

master is not usually of sufficient pecuniary ability to respond to the demands of the voyage and he is the authorized agent of the owners. As Chief Justice Marshall said in *The United States v. The Schooner Little Charles*, 1 Brock., 347, 354, "The vessel speaks and acts by the master." In this case the wharfage contract was not made with the master of the vessel but with the owner, the Polish-American Navigation Company, and the exact amount to be paid and the times of payment were expressly stipulated.

In this case not only was the contract made with the owner but it included something more than wharfage services. It embraced a charge for lights at the rate of \$1.00 per light, per night, for cleaning the pier plus 10 per cent and for carting dirt \$2.50 per one horse load and \$1.30 for dump ticket when required, and \$5.00 per two horse load and \$2.15 for dump ticket when required. All of this was additional to the \$250.00 per day which the parties agreed should be charged for the use of the wharf. The bills were not made out against the ship but against the Polish-American Navigation Company, the owner, and also bills were sent to the United States Marshal. Two months after that official had notified the Dock Company that he would not assume liability for any charges until he was directed to do so by order of the court, and the Polish-[fol. 215]American Navigation Company having been slow in making payments and practically insolvent, the Dock Company filed its libel against the ship. But it at no time filed the notice claiming a lien against the vessel in the manner provided by Sections 80 and 82 of the Lien Law of the State of New York. The facts in many respects are similar to those in *The Advance*, 60 Fed. 766, 768. In that case Judge Addison Brown felt constrained to find that no lien existed, among other reasons "the evidence indicates beyond doubt, as it seems to me, that the dealings were upon a personal contract between the two companies, which did not look to any credit of the ship, but only to the personal responsibility of the steamship company." On appeal to this court the decision below was affirmed in 71 Fed. 987.

A maritime lien arose only where credit was given to the vessel not where it was given to the owner or charterers. If the agreement was made with the owner, unless there was an express agreement for a lien or the circumstances

indicated that the services were rendered or the supplies furnished with the understanding that the ship itself would be responsible, no lien arose. *The Valencia*, 165 U. S. 264. See *The Andrew J. Smith*, 263 Fed. 1004; *The Hatteras*, 255 Fed. 518, 520; *the J. Doherty*, 207 Fed. 997; *The Muskegon*, 275 Fed. 348, 350; *The Suelco*, 286 Fed. 286. In this case the credit was not given to the ship, and the contract was not made with the master of the ship but by the ship's owner.

[fol. 216] In *The St. Jago de Cuba*, 9 Wheat. 409, 417, the Supreme Court, 100 years ago, said:

"The whole object of giving admiralty process and priority of payment to privileged creditors, is to furnish wings and legs to the forfeited hull, to get back, for the benefit of all concerned; that is, to complete her voyage. \* \* \* It is not in the power of anyone but the ship-master, not the owner himself, to give these implied liens on the vessel; \* \* \*. The vessel must get on; this is the consideration that controls every other; and not only the vessel, but even the cargo, is sub modo subjected to this necessity. \* \* \*. The necessities of commerce require that when remote from his owner, he (the master) should be able to subject his owner's property to that liability (lien), without which it is reasonable to suppose, he will not be able to pursue his owner's interests. But when the owner is present, the reason ceases, and the contract is inferred to be with the owner himself, on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived."

And in *The C. W. Moore*, 107 Fed. 957, 958, District Judge Seaman, after stating the rule that a maritime lien arises out of a maritime claim contracted on the credit of the vessel and not on the credit of the owner, and that credit to the vessel is implied when the obligation is incurred by the master, goes on to say that if the contract is made by the owner it "is presumptively made on the personal credit of the contracting party, and, without proof of facts or [fol. 217] circumstances to repel the presumption, no lien attaches."

The Act of Congress approved June 23, 1910, c. 373, 36 Stat. Pt. I, 604, sec. 1, provides that any person furnishing repairs, supplies, or other necessities, including the use

of dry dock or marine railway, upon the order of the owner shall have a lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel. And the Act approved on June 5, 1920, c. 349, 41 Stat. Pt. I, sec. 29, subsec. P, p. 1005 repeated the words quoted from the provision in the Act of 1910. The only change made was to add in the Act of 1920 the word "towage" after the word "supplies." These Acts have undoubtedly enlarged the right to a maritime lien. *The United States v. Carver*, 260 U. S. 482, 488.

The Supreme Court has pointed out that one of the objects of the Act of 1910 was to do away with the doctrine that when the owner of a vessel contracts in person for "necessaries" or is present in the port when they are ordered it is presumed that the materialman did not intend to rely upon the credit of the vessel and no lien arises. *Piedmont Coal Company v. Seaboard Fisheries Company*, 254 U. S. 1, 11. If that was intended by the Act of 1910 it was equally the intention of the Act of 1920. But what is included in the word "necessaries"? That question has not yet been ultimately determined.

The question of what is meant, in the Act of 1910, by the [fol. 218] word "other necessaries" is discussed in 24 *Harvard Law Review*, 182, 196, 197, and the opinion was expressed that "wharfage would clearly appear to be brought within the scope of the Act by the specific enumeration among 'other necessaries' of the use of a dry dock." That conclusion is strengthened by the use of the word "towage" in the Act of 1920. And see *United States v. Certain Subfreights Due Steamship Neponset*, 300 Fed. 981, 986, 987; *The Liberator*, 298 Fed. 159; *The Henry S. Grove*, 285 Fed. 60. But whether wharfage is a "necessary" within the meaning of the Act of 1920 has not been decided by the Supreme Court or by this court.

This court in *The Muskegon*, 275 Fed. 348, construing the words "or other necessaries" as used in the Act of 1910 did not include the services of a master stevedore in loading a vessel in her home port. In *The Hatteras*, 255 Fed. 518, this court, passing upon the Act of 1910, and the meaning of the same words held that towage was not included within their meaning. In that case this court adopted the views of District Judge Veeder in the *J. Doherty*, 207 Fed.

997, as to the meaning of the phrase "other necessities," in the Act of 1910 in which he held that they were not applicable to towage.

The question whether wharfage is a "necessary" within the meaning of the Act of 1920 was not argued when this case was heard. As it is not important in the view which we take of the case we express no opinion concerning it at this time. It is enough for the present purpose that no lien attached while the ship was in *custodia legis*, which was [fol. 219] practically the entire period for which the bill was rendered.

But if no maritime lien existed for the wharfage services afforded to the vessel while it was withdrawn from navigation and was in the custody of the United States Marshal, as we have held is the case, is the libelant nevertheless entitled to an equitable lien, and if so, one which is entitled to priority over the liens of the libelants in the consolidated suit? We confess that at first blush the suggestion strikes us with surprise that while the wharf owner has no maritime lien during the period the ship was in *custodia legis*, he nevertheless has an equitable lien, and that such lien is entitled to priority over the maritime lien of the shippers.

The learned judge who decided this case in the court below relied upon the decision of this court in *The St. Paul*, 271 Fed. 265. And counsel at the argument in this court told us that that case is on all fours with the case at bar, and fully sustains the decree below. We do not at all agree with any such conclusion. There is nothing in *The St. Paul* case which lends support to the doctrine now contended for. The question which the District Judge decided in the present case, instead of being as he assumed the question which was decided in the *St. Paul*, is precisely the one which was not presented, or litigated, or decided in that case. The wharfage in that case was incurred pursuant to an order made by the court and with the consent of all the libelants. It was made in the only way in which a maritime lien can be [fol. 220] validly created against property in *custodia legis*, namely by an order of the court. The assignment of errors in *The St. Paul* contained no reference to the subject of a lien either maritime or equitable. And an examination of



the briefs submitted shows that no question of any kind of lien was in any way discussed herein. There were but two questions before this court in that case. One was whether this Court could entertain the appeal. The other was the amount of wharfage to be paid and for what period. There is nothing whatever in the opinion as to an equitable lien. The only reference to a lien contained in the opinion is in the following paragraph, which explains why this court thought it had a right to hear the appeal:

"The method here pursued is without precedent, and not to be approved as such; but we feel justified in treating the claim as it was below, viz. as a demand for preferential payment, or as an asserted superior lien on the proceeds of the steamship. Consequently a final order refusing (in part) such payment out of, or lien upon, a fund in the registry is the subject of appeal. *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157."

Strictly speaking a lien is not either a *jus in re* or a *jus ad rem*. It is not a property in the thing itself, nor does it constitute a right of action for the thing. It rather constitutes a charge upon the thing. Story in his work on [fol. 221] *Equity Jurisprudence*, vol. 2, sec. 1215, speaks of equitable liens "by which we are to understand, such liens as exist in equity, and of which courts of equity alone take cognizance." And Bouvier's *Law Dictionary* defining equitable liens states that they "are such as exist in equity, and of which courts of equity alone take cognizance." And Pomeroy in his work on *Equity Jurisprudence*, vol. 3, sec. 1234, speaks of the doctrine of equitable liens as of wide application in administering the rights and remedies "peculiar to equity jurisprudence."

Courts of Admiralty, it is sometimes said, are courts of equity. This is because the principles of equity rather than the strict rules of the common law are those upon which the courts of admiralty act. But it is perfectly clear that a court of admiralty is not a court of equity, and that it is not entitled to draw within its jurisdiction matters primarily of non-maritime jurisdiction. *United Transportation and Lighterage Co. v. New York & Baltimore Transportation Line*, 180 Fed. 902; *The Albert Schultz*, 12 Fed.



156; *The Willamette Valley*, 76 Fed. 838, 844. In *Davis v. Child*, 2 Ware 78, 7 Fed. Cas. 112, Case No. 3,628.

In the separate and concurring opinion of the present writer in *The Ada*, 250 Fed. 194, 198, it was said:

"I also agree that courts of admiralty, having obtained jurisdiction, do not dispose of non-maritime subjects, after the manner of courts of equity, for the purpose of doing [fol. 222] complete justice. While admiralty courts act as courts of equity so far as their powers go, their powers are limited to maritime contracts or transactions, and they have no general jurisdiction to administer relief as courts of equity, or to administer complete relief. They differ, too, from the equity courts, in that they do not undertake to determine equitable rights."

In *Kellum v. Emerson*, 2 Curt. 79, 14, Fed. Cas. 263, Case No. 7669, Mr. Justice Curtis, sitting in the Circuit Court for the District of Massachusetts held that the admiralty was without jurisdiction over a libel asserting an equitable title to one-fourth of a vessel, and claiming an account of its earnings, and the proceeds of its sale. The part owners sailed the vessel and the libellant worked as a carpenter on board. In his opinion, Mr. Justice Curtis said:

"It is often said that a court of admiralty is a court of equity, acting on maritime affairs. This is true when properly understood. A court of admiralty applies the principles of equity to the subjects within its jurisdiction. But that jurisdiction differs very widely from the jurisdiction of courts of chancery; and in my opinion embraces no case, where an equitable title, arising out of a trust, is the basis of the claim, and its subject-matter is the proceeds of a sale wrongfully made, in violation of that trust. I have looked in vain for any precedent or any principle upon which to [fol. 223] place such a jurisdiction. I am not aware that in any court of admiralty in England, or in this country, any serious attempt has been made to assert it, or obtain its exercise."

In *The Amelia*, 23 Fed. 406, an attempt was made in the Circuit Court for the Southern District of New York to attempt to enforce an equitable interest as against a legal title. But the Circuit Judge declared: "This the court of admiralty does not undertake. When it proceeds in a peti-

tory suit, it proceeds upon legal title." The court affirmed the decree below.

In Benedict's Admiralty (4th ed.) sec. 251, it is said:

"In the exercise of its appropriate jurisdiction, the court of admiralty exercises equitable, as well as legal jurisdiction. If the subject be of a maritime nature, and so within the power of the court, and be of such a nature that the relief must be in the nature of equitable relief, the court is entirely competent to give the equitable, as well as the legal relief. It has the capacity of a court of law, and in certain respects, the capacity of a court of equity. \* \* \* It cannot, in a technical sense, be called a court of equity. It is rather a court of justice."

And this court in *The Ada*, 250 Fed. 194, speaking through Judge Ward, said:

"Evidently the whole controversy could have been disposed of in an action at law, but the jurisdiction of a court [fol. 224] of admiralty is confined to maritime subjects. It cannot, having obtained jurisdiction, dispose of non-maritime subjects, for the purpose of doing complete justice, after the manner of courts of equity, nor can it distribute funds in its possession, as do courts of equity and bankruptcy, among all creditors, preferred and general. Its power to dispose of the proceeds of a vessel, though it extends to the payment of non-maritime liens, after maritime liens have been satisfied, does not extend to claims in personam or of general creditors, except so far as to pay over any surplus to the owner."

In *The Eurana*, 1 Fed. (2d Series) 684, the Circuit Court of Appeals for the Third Circuit has recently decided that in the absence of an express agreement therefor, or facts from which it would be implied, a general agent does not have a maritime lien for advances and disbursements made in behalf of vessels of his principal during his agency. It was pointed out that a maritime lien has its origin in a desire to protect the ship, and that such a lien being secret and unrecorded, is *stricti juris*, and cannot be extended by judicial construction, analogy or inference. "Such liens," said the Court, "are an exception to the rule that all creditors have equal rights in the property of their debtor. They rest upon an entirely different principle." In that case

the Fleet Corporation claimed that the funds and fuel oil [fol. 225] belonging to it had been used for the benefit of the vessel and/or her owners, and on that account claimed a lien on the vessel or her proceeds. But their claim was denied.

It is no doubt true that a party may by express agreement create a claim on property of which he is the owner or in possession and that in a proper case a court of equity will establish and enforce it. Pomeroy in his work on Equity Jurisprudence, vol. 3, par. 1235, states the doctrine as follows:

“The doctrine may be stated in its most general form that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers or encumbrancers with notice \* \* \*. The ultimate grounds and motives of this doctrine are explained in the preceding section; but the doctrine itself is clearly an application of the maxim, equity regards as done that which ought to be done.”

[fol. 226] The above doctrine was quoted approvingly and applied in *Walker v. Brown*, 165 U. S. 654, 664.

But in the instant case it does not appear from the agreement made between the Dock Company, as owner of the wharf, and the Polish-American Navigation Company, as the owner of the ship, that any intention existed to make the ship a security for the wharfage and other expenses which were incurred.

In Bispham's Equity (8th ed.) sec. 351, it is said:

“In modern times the doctrine of equitable liens has been liberally extended for the purpose of facilitating mercantile transactions, and in order that the intention of parties to create specific charges may be justly and effectually carried out.”

But we find nothing in the facts of this case which indicates that any intention existed to make the ship a security for the charges incurred, or which took the case out of the rule that where the ship is in custodia legis no lien arises for wharfage services. And if under those circumstances, no maritime lien arises in admiralty we certainly have no reason for thinking that it arises in equity and that the courts of equity will accord it priority over the maritime liens created by maritime law, to say nothing of its recognition by the courts of admiralty. No decision asserting any such doctrine is known to us. We think it unsupported by [fol. 227] authority and contrary to principle. The effect of creating an equitable lien and giving it priority over the maritime lien is in plain language an attempt to extend the maritime lien by construction by not calling it a maritime but an equitable lien. The courts have said many times that a maritime lien is *stricti juris* and not to be extended by construction, analogy or inference. What was decided in the court below seems to us to have been wholly unwarranted.

Decree reversed.

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[fol. 228] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT—Filed July 23, 1925

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court [fol. 229] be and it hereby is reversed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. W. R. C. M. H.

[File endorsement omitted.]

[fols. 230-232] Petition for rehearing, covering 3 pages, omitted from this print. It was denied and nothing more by order August 10, 1925.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

[fol. 233] ORDER DENYING PETITION FOR REHEARING—Filed August 10, 1925

A petition for a rehearing having been filed herein by counsel for the appellee;

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

H. W. R. C. M. H.

[File endorsement omitted.]

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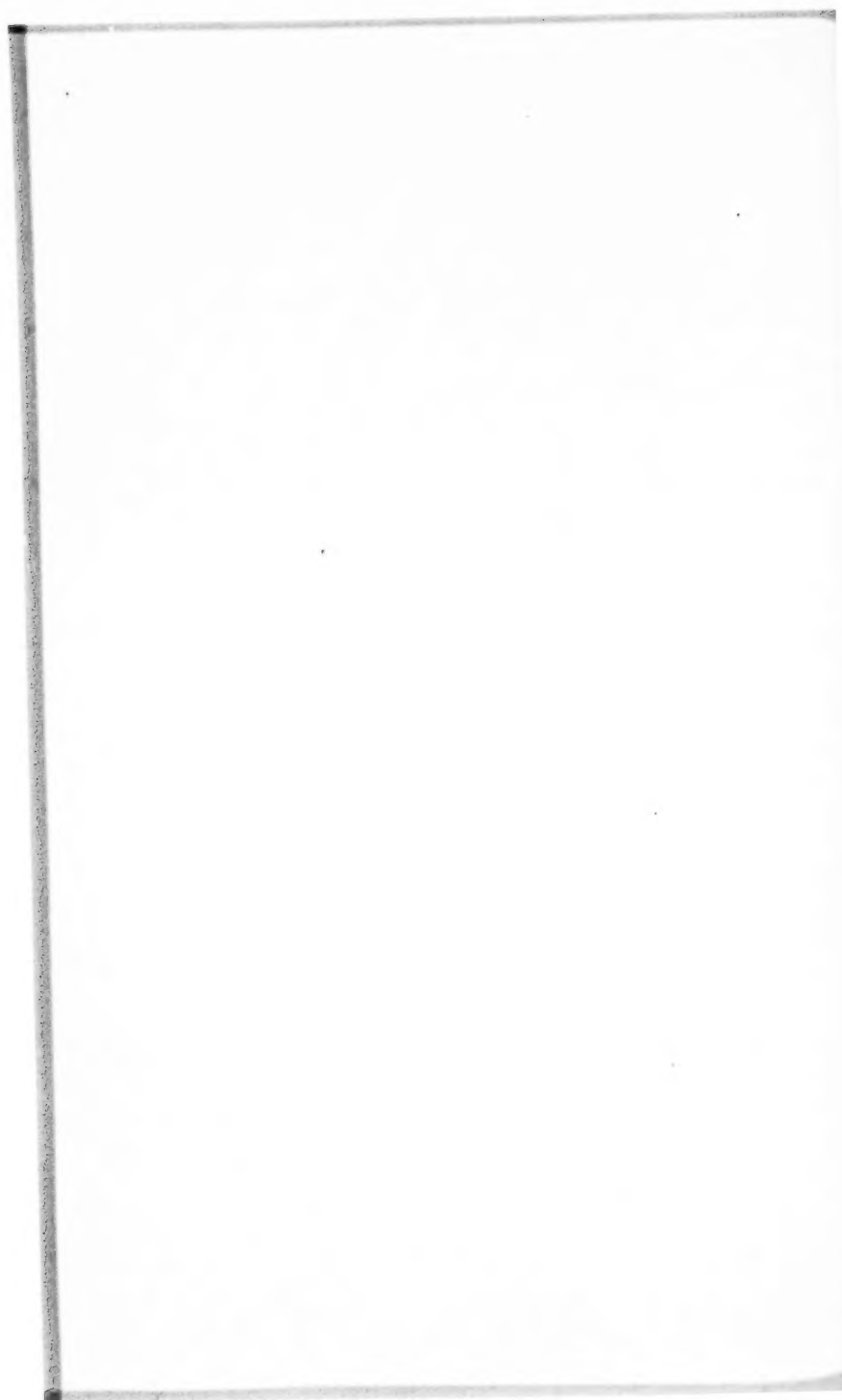
[fol. 234] Clerk's certificate to transcript of record from United States Circuit Court of Appeals omitted in printing.

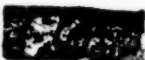
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[fol. 235] IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 23, 1925

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



No.  229

Supreme Court, U. S.  
FILED

OCT 14 1925

WM. R. STANSBURY  
CLERK

Supreme Court of the United States

OCTOBER TERM—1925

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NEW YORK DOCK COMPANY

*Petitioner*

*against*

Steamship "POZNAN," her engines, etc., and  
JOHN B. HARRIS COMPANY

*Respondent*

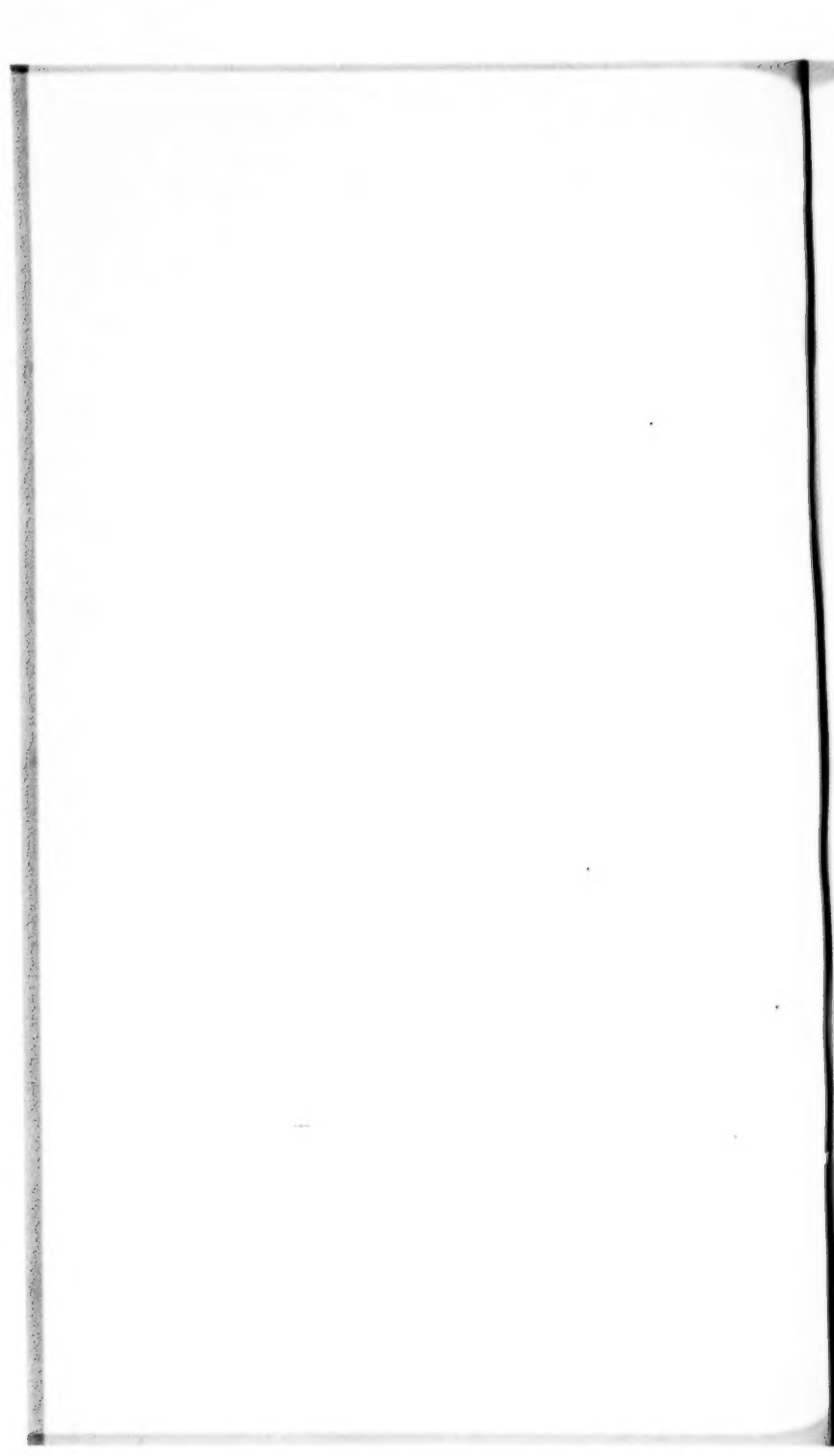
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PETITION AND BRIEF FOR WRIT OF CERTIORARI  
TO THE CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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JOSEPH S. AUERBACH  
*Proctor for Petitioner*

JOSEPH S. AUERBACH  
CHARLES H. TUTTLE  
ALEXANDER J. FEILD  
*Of Counsel*





## INDEX.

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### STATUTES AND TEXTS CITED.

|  | PAGE   |
|--|--------|
| Act of June 5, 1920, C. 250, Sec. 30 (Merchant Marine Act) ..... | 20, 21 |
| Act of June 23, 1910, C. 373 (Maritime Liens Act) ....           | 21     |
| 26 Cyclopedia of Law, subject Maritime Liens .....               | 17, 20 |

### CASES CITED.

|  |            |
|--|------------|
| Advance, The, 60 Fed., 766.....  | 18         |
| Allan Wilde, The, 264 Fed., 291.....   | 13         |
| Alliance, The, 56 Fed., 609.....   | 22         |
| Atlantic Transport Co. v. Imbrovek, 234 U. S., 52....  | 22         |
| Bold Buccleugh, 7 Moore P. C., 267 .....   | 23         |
| Easton, <i>Ex parte</i> , 95 U. S. ....  | 14, 16, 22 |
| Emily Souder, The, 17 Wall, 66.....  | 15, 17     |
| Esteban de Antunano, The, 31 Fed., 920 .....   | 25         |
| J. E. Rumbell, The, 148 U. S., 1.....  | 15         |
| John G. Stevens, The, 170 U. S., 113.....  | 23, 24     |
| J. S. Warden, The, 175 Fed., 314.....  | 25         |
| Kate Tremaine, The, 5 Ben., 60, Fed. Cas., 7622.....   | 14, 19     |
| Neptune, The, 3 Hagg., 129.....  | 19         |
| Nisseqogue, 280 Fed., 174 .....  | 25         |
| Old Dominion S. S. Co. v. City of New York, 286 Fed.,<br>155, aff'd 286 Fed., 157 (C. C. A. 2) ..... | 13         |
| Piedmont Coal Co. v. Seaboard Fisheries Co., 254<br>U. S., 1.....                                    | 21         |

|   | PAGE   |
|---|--------|
| Rathlin Head, The, 292 Fed., 867.....             | 13     |
| St. Jago de Cuba, 9 Wheat., 409.....              | 18, 19 |
| St. Paul, The, 271 Fed., 265.....                 | 25     |
| Tucker <i>v.</i> Alexandroff, 183 U. S., 424..... | 17     |
| Young America, The, 30 Fed., 789.....             | 25     |

#### PETITIONERS' BRIEF.

|  |    |
|--|----|
| Summary of the Facts.....                                  | 8  |
| Decision of Circuit Court of Appeals.....                  | 9  |
| Petitioners' Contention .....                              | 10 |
| First Point—General Maritime Law.....                      | 12 |
| Second Point—Act of June 5, 1920.....                      | 20 |
| Third Point— <i>Custodia Legis</i> relaxed.....            | 23 |
| Fourth Point—Petitioners' right irrespective of lien ..... | 26 |

IN THE  
**Supreme Court of the United States**

OCTOBER TERM—1925.

NEW YORK DOCK COMPANY,  
Petitioner,

*against*

STEAMSHIP "POZNAN," her engines, etc.,

and

JOHN B. HARRIS COMPANY,  
Respondent.

**Petition for Writ of Certiorari to the United States  
Circuit Court of Appeals for the  
Second Circuit.**

*To the Honorable, the Chief Justice and the Associate  
Justices of the Supreme Court of the United States.*

Your petitioner, New York Dock Company, a New York corporation, respectfully submits its petition for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Second Circuit in the above entitled cause.

The Circuit Court of Appeals has reversed a decree entered in the District Court for the Southern District of New York, decreeing to your petitioner preferential payment from the proceeds of the vessel.

## I.

**Nature of the Proceeding.**

This was a libel by the petitioner against the Steamship "Poznan" for wharfage furnished her on the Brooklyn Shore of East River under a contract with her owner, a New Jersey corporation.

After the vessel had docked and begun the use of petitioner's wharf under such contract, John B. Harris Company and sundry others filed libels against her for breach of contracts of affreightment and for the recovery of possession of parts of her cargo. She was arrested under these libels, and under an order of the District Court she was allowed to discharge her cargo on petitioner's wharf and thus deliver it to said libellants and others as the owners thereof, said libellants objecting to her removal from petitioner's wharf. Thereafter the petitioner filed its said libel against the vessel for the wharfage furnished, and upon her sale claimed preferential payment therefor from her proceeds.

The District Court denied the petitioner a lien under its contract with the owner of the vessel, but decreed to the petitioner the fair and reasonable value of the use of its wharf, which, upon a reference, was ascertained to be the same as the contract price and to amount with interest and costs to over \$20,000; and payment thereof was decreed in preference to the claims of said John B. Harris Company and others who had libelled the vessel for breach of contracts of affreightment, and who had intervened in the petitioner's libel.

On appeal by John B. Harris Company as intervenor, the Circuit Court of Appeals for the Second Circuit reversed the decree of the District Court and denied to the petitioner any payment from the proceeds of the vessel.

## II.

### Theory of the Decree Below Reversing the Decree of the District Court.

From the opinion of the Circuit Court of Appeals it appears that the decree of the District Court was reversed on the theory:

1. That the petitioner did not have a maritime lien on the vessel for the wharfage furnished prior to her arrest by the marshal, because there was no express agreement or understanding with the owner that such lien should arise.

2. That the petitioner had no maritime lien on the vessel for the wharfage furnished her after her arrest by the marshal, because such lien could not arise while she was in *custodia legis*, although with the consent of the respondent and by permission of the Court she used the petitioner's wharf for the discharge of her cargo.

3. That having no maritime lien on the vessel, the petitioner was not entitled to preferential payment from the proceeds of the vessel for the wharfage service rendered, although by the use of the wharf the respondent was enabled to recover its property and enforce its claim against the vessel for damages.

## III.

### Questions Presented.

The record below, a certified copy of which is herewith submitted as an exhibit, presents the following questions:

1. Did a maritime lien arise by operation of law in favor of the petitioner for wharfage services rendered the vessel under the contract with the owner, or was it necessary for the parties to have an express agreement or understanding for such lien before it could arise?

2. Is wharfage a necessary within the meaning of the term "other necessities" as used in the Merchant Marine Act of June 5, 1920?

3. If the petitioner had a maritime lien on the vessel was such lien terminated by operation of law upon the arrest of such vessel by the marshal at the instance of the respondent, who objected to her removal, when, by an order of the District Court, she was permitted to discharge her cargo on petitioner's wharf and deliver same to the respondent and others without any arrangement for her removal or wharfage elsewhere?

4. If the petitioner had no maritime lien on the vessel remaining at and using its wharf while in the custody of the marshal, was it nevertheless entitled to payment of the fair and reasonable value of the wharfage service thus rendered from the proceeds of the vessel, in preference to the claim of the respondent at whose instance she was held in custody, who objected to her removal and who was thus enabled to recover a part of her cargo and enforce a claim against her for damages for breach of a contract of affreightment?

#### **IV.**

##### **The Decision of the Circuit Court of Appeals.**

Your petitioner is advised and believes that the Circuit Court of Appeals, in reversing the decree of the District Court, has decided a federal question in a way probably in conflict with applicable decisions of this Court; has decided an important question of federal law which has not been, but should be, settled by this Court, and has decided an important question of general law in a way probably untenable and in conflict with the weight of authority; all of which will more fully appear in the annexed brief.

## V.

**The Public Importance of the Questions Presented  
and the Far-reaching Effect of the Decree of  
Reversal.**

The questions presented are of grave importance to shipping generally. Under modern conditions, especially in a port like the Port of New York, wharfage facilities must be engaged before the arrival of the vessel. Therefore the contract for wharfage is usually made with the owner or his broker and not with the master of the vessel. The ruling of the learned Circuit Court is subversive of the long established practice in the Port of New York, where it has not been customary expressly to agree that there shall be a lien on the vessel. Wharves and wharfage facilities have been built and the rates of charge fixed on the theory that the wharf owner has a maritime lien for wharfage service rendered, which may be enforced against the vessel unless it is waived; it being understood that the hazards of relying on the individual credit of the owners of vessels is eliminated unless the wharf owner elects to assume them by the waiver of such lien.

Your petitioner is advised and believes that the decision of the Circuit Court of Appeals requires the wharf owner to rely on the individual credit of the vessel owner when contracting with him or his broker for wharfage, unless there is an *agreement* that the vessel shall be security; that this will increase the expenses of the wharf owners, and, as a result, shipping generally will be injuriously affected.

NEW YORK DOCK COMPANY,

By D. L. TILLY,  
Vice-President,  
Petitioner.

United States of America, }  
 State of New York, } ss.:  
 County of New York, }

D. L. TILLY, being duly sworn, deposes and says, that he is vice-president of the New York Dock Company, the petitioner named in the foregoing petition; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. That the reason why this verification is not made by the petitioner, is that the petitioner is a corporation; that as to all matters not stated on deponent's knowledge, the sources of his information and the grounds of his belief are the records and papers of the petitioner under his supervision and control, and information derived from his conduct, and such vice-president, of the business of the petitioner.

D. L. TILLY.

Subscribed and sworn to before me }  
 this 9th day of October, 1925. }

(Seal)

FRANK C. TITUS,  
 Notary Public.

Commission expires March 30, 1927.

United States of America, }  
 Southern District of New York, } ss.:  
 County of New York, }

JOSEPH S. AUERBACH, being duly sworn, says, that he is the proctor for the petitioner named in the foregoing



petition; that he knows the contents of such petition, and the facts therein stated are true to the best of his knowledge and belief.

JOSEPH S. AUERBACH.

Subscribed and sworn to before me }  
this 9th day of October, 1925. }

(Seal)

FRANK C. TITUS,  
Notary Public.

Commission expires March 30, 1927.

**Certificate of Counsel.**

We hereby certify that we have examined and read the foregoing petition for writ of certiorari, and in our opinion such petition is well founded and should be granted by this Honorable Court, and that said petition is not filed for delay.

Dated, October 9, 1925.

JOSEPH S. AUERBACH,  
CHARLES H. TUTTLE,  
ALEXANDER J. FEILD,  
Of Counsel.

SUPREME COURT OF THE UNITED STATES,  
OCTOBER TERM—1925.

|  |   |  |
|--|---|--|
| <p style="text-align: center;">NEW YORK DOCK COMPANY,<br/><br/><i>against</i><br/>STEAMSHIP "POZNAN," her engines, etc.,<br/>and<br/>JOHN B. HARRIS COMPANY,</p> | } | <p>Petitioner,<br/><br/><br/><br/><br/><br/><br/><br/><br/>Respondent.</p> |
|--|---|--|

**PETITIONER'S BRIEF.**

**Summary of the Facts.**

The Steamship "Poznan" was made fast to Pier No. 6, owned by New York Dock Company, the petitioner herein, under a contract by her owner for her use of said pier to discharge (R., 14). Soon thereafter, but not until wharfage for one or two days had accrued under the contract, at the instance of John B. Harris Company, the intervenor and respondent herein, and sundry other libellants, she was arrested by the United States Marshal, who allowed her to remain fast to said pier (R., 15). Thereafter and while still fast to said pier, upon the application of said libellants, the District Court made an order allowing the vessel to discharge her cargo and deliver it to said libellants and others (R., 15, 23). Before the cargo was fully discharged under said order, the charterer of the vessel applied to the Court for the removal of the vessel to another pier, but this application was denied upon the request of said libellants, including the intervenor herein (R. 54).

Thereafter New York Dock Company, the petitioner

herein, filed its libel against the vessel to recover for the wharfage services rendered her (R., 3). In this libel said John B. Harris Company intervened (R., 9), denying the libellant's right to a maritime lien on the vessel. The District Court denied recovery under the contract but granted recovery on *quantum meruit* (R., 55, 59) and ordered a reference to ascertain the fair and reasonable value of the services rendered and the benefits received by the intervenor and others (R., 61). But the libellant, the petitioner herein, continued to insist on its right to recover under the contract and to a maritime lien and also to its right to preferential payment from the proceeds of the vessel, which had by that time been sold, irrespective of its right to such lien (R., 64). The special commissioner found that the fair and reasonable value of the services rendered and the benefits enjoyed by the intervenor and others was the same as the contract price (R., 175, 14). The report of the commissioner was confirmed and final decree was entered accordingly (R., 181, 183).

On appeal the Circuit Court of Appeals reversed the decree of the District Court (R., 194-227) and denied the appellee's petition for a rehearing (R., 233).

#### **The Decision of the Circuit Court of Appeals.**

The reversal by the Court below was principally on the ground that there was no maritime lien in favor of the petitioner because there was no "*express agreement for a lien*" and no "*understanding that the ship itself would be responsible*" (R., 215). That such was the principal ground for reversing the decree of the District Court is emphasized by the further statement in the opinion (R., 226) that it does not appear from the agreement that "*any intention* existed to make the ship a security"; and further that nothing is found in the facts

which indicates "that any *intention* existed to make the ship a security"; and still further (R., 220) that "a lien is not either a *jus in re* or a *jus ad rem*" but "it rather constitutes a *charge* upon the thing" (italics ours). This is a clear holding that a maritime lien for wharfage cannot arise unless the parties *agree* that it shall come into existence. It was never contended and the Court below did not hold that the wharfage was not furnished by the petitioner, and there is no suggestion of a waiver or estoppel.

A further ground for the reversal of the decree of the Court was that after her arrest the vessel was in *custodia legis* and withdrawn from navigation, that is, from maritime commerce (R., 226), although she was by order of the Court allowed to pursue her ordinary business in its most essential feature by the discharge of her cargo.

There is presented here no question of the appreciation of evidence by the Court below. All of the essential facts were agreed upon (R., 13-25), and the sole question before the Court below was what conclusion of law should be drawn from these facts.

### **Petitioner's Contention.**

The petitioner contends as follows:

1. The Court below failed to follow applicable decisions of this Court when it held that no maritime lien arose in favor of the petitioner because there was no express agreement or understanding that there should be such lien. Petitioner's Pier No. 6 was supplied for the exclusive use and benefit of the Steamship "Poznan" in discharging, under an agreement with her owner. Only the "Poznan" could use it. Even her owner personally could not use it for any purpose. The agreement was not a lease of the pier to her owner personally. For the

wharfage thus furnished a maritime lien arose against the vessel in favor of the petitioner by operation of the general maritime law, and no express agreement or understanding between the parties that there should be such a lien was necessary. The presumption of credit to the owner and not to the vessel, which formerly applied in cases of "repairs, supplies and other necessities" does not and never has applied in cases of wharfage and similar services rendered directly to the vessel.

2. The petitioner having furnished wharfage to the vessel under a contract with her owner, a maritime lien arose in petitioner's favor under the Merchant Marine Act of June 5, 1920, and it was not necessary to allege or prove that the wharfage was furnished on the credit of the vessel. While the Court below declined to express an opinion as to whether wharfage is or is not included in this Act, the effect of the decision is that it is not. This question has not been, but should be, decided by this Court on account of its grave importance and the confusion it has caused in the lower courts.

3. The petitioner had a valid maritime lien on the vessel for wharfage from the moment she was made fast to the pier. Being a privilege inseparably incident to the contract under which it arose, it was not terminated by the arrest of the vessel, when the vessel and those at whose instance she was held were, by permission of the Court, allowed to enjoy the benefits provided for in the contract. The denial of such lien by the Court below is against the weight of judicial opinion and is untenable. This question is of great importance in the administration of the maritime law. It does not seem to have been, but should be, settled by this Court.

4. But aside from any question of a lien on the vessel the petitioner was entitled to payment for its wharfage

service in preference to those who had enjoyed the benefit of such service in using the process of the court. By denying the petitioner preferential payment from the proceeds of the vessel, the Court below departed from the accepted and usual course of judicial proceedings, and its decision in this regard should be reviewed by this Court.

### **FIRST POINT.**

**Under the General Maritime Law the petitioner had a lien on the Steamship "Poznan" for the wharfage services rendered her.**

The wharfage services were rendered by the petitioner in Port of New York. The owner of the vessel was a New Jersey corporation, and the vessel belonged to a port of that State. She was therefore a foreign vessel in the Port of New York.

The contract for the wharfage services is thus set forth in the agreed statement of facts (R., 14) :

"On or about November 30, 1920, New York Dock Company and Polish-American Navigation Corporation by C. J. Nevelson, Treasurer, entered into an agreement for the use of said Pier No. 6 by the S. S. Poznan to discharge, Polish-American Navigation Corporation agreeing to pay therefor \$250.00 per day. charge to commence from 7:00 A. M., December 1, 1920, and to continue up to the time the steamer left and/or all cargo was removed, and agreeing to pay in addition thereto for lights at the rate of \$1.00 per light, per night or part thereof, for cleaning pier cost plus ten per cent., and for carting dirt \$2.50 per one horse load and \$1.30 for dump ticket when required, and \$5.00 per two horse load and \$2.15 for dump ticket when required."

It will thus be seen that the contract was made *exclusively for the benefit of the vessel*. The agreement was "*for the use of Pier No. 6 by the said S. S. Poznan to discharge.*" No other vessel could use it, nor could the owner of the vessel use it personally for any purpose whatever. It was not, and indeed could not, be found that the contract was a lease of the pier to the owner of the vessel personally. The contract shows that the owner of the pier, the petitioner herein, was to furnish the lights and do the cleaning incident to the use of the pier, and presumably the petitioner, as owner of the pier, was charged with the duty of rendering to the vessel any other service necessarily incident to its use of the pier.

The contract was for the wharfage of the vessel by the petitioner, as wharfage has heretofore been defined by the Circuit Court for the Second Circuit and understood in the Port of New York.

"'Wharfage' is money paid for landing goods upon or loading them from a wharf. \* \* \*

"It is too well known to need citation or reference to papers that, when a steamship engages a berth, wharfage by that name is due and payable, not only while she lies alongside, but while the discharging space is occupied by her cargo. This is the immemorial custom of this port." (The Port of New York.)

*Old Dominion S. S. Co. v. City of New York, et al.*, 286 Fed., 155, affirmed 286 Fed., 157 (C. C. A., 2).

To the same effect are the following cases:

*The Allan Wilde*, 264 Fed., 291;

*The Rathlin Head*, 292 Fed., 867.

"The money paid for the aid to the vessel in

her business, which she derives from the use of the wharf, is not rent, but wharfage."

*The Kate Tremaine*, 5 Ben., 60, Fed. Cas. 7622.

It was not, and indeed could not be, found that the pier was leased by the owner of the vessel personally. The wharfage services to the vessel were rendered by the petitioner and not by her owner, and in denying the petitioner a maritime lien the Court below failed to follow the decisions of this Court in the following respects.

1. The Circuit Court of Appeals, in reversing the decree of the District Court, said (R., 215) :

"If the agreement was made with the owner, unless there was an express agreement for a lien or the circumstances indicated that the services were rendered or the supplies furnished with the understanding that the ship itself would be responsible, no lien arose."

In thus denying the petitioner a maritime lien the learned Court below failed to follow the decisions of this Court, notably the decision in *Ex parte Easton*, 95 U. S., 68, 73, 75, 77, where the Court said :

"Compensation for wharfage may be claimed upon an express or an implied contract, according to the circumstances. Where a price is agreed upon for the use of the wharf, the contract furnishes the measure of compensation; and when the wharf is used without any such agreement, the contract is implied, and the proprietor is entitled to recover what is just and reasonable for the use of his property and the benefit conferred.

. . . . .

"These remarks are sufficient to show that wharves, piers, or landing-places are well-nigh as essential to commerce as ships and vessels, and



are abundantly sufficient to demonstrate that the contract for wharfage is a maritime contract, for which, if the vessel or water-craft is a foreign one, or belongs to a port of a State other than that where the wharf is situated, a maritime lien arises against the ship or vessel in favor of the proprietor of the wharf.

“Viewed in the light of these considerations, it is clear that a contract for the use of a wharf by the master or owner of a ship or vessel is a maritime contract, and, as such, that it is cognizable in the admiralty; that such a contract, being one made exclusively for the benefit of the ship or vessel, a maritime lien in the case supposed arises in favor of the proprietor of the wharf against the vessel for payment of reasonable and customary charges in that behalf for the use of the wharf, and that the same may be enforced by a proceeding *in rem* against the vessel, or by a suit *in personam* against the owner.”

The lien arises by operation of the maritime law and no express pledging of the vessel or agreement that there shall be a lien is necessary; nor is it necessary to stipulate that the credit shall be given on her account.

*The Emily Souder*, 17 Wall., 666;

*The J. E. Rumbell*, 148 U. S., 1.

2. The learned Court below likewise failed to follow the decisions of this Court in drawing a distinction between the right to a maritime lien when the contract for wharfage was made with the owner and when it was made with the master of the vessel, saying (R., 214):

“As Chief Justice Marshall said in *The United States v. The Schooner Little Charles*, 1 Brock. 347, 354: ‘The vessel speaks and acts by her master.’ In this case the wharfage contract was not

made with the master of the vessel but with the owner, the Polish-American Navigation Company, and the exact amount to be paid and the times of payment were expressly stipulated."

And again (R., p. 215):

"\* \* \* the contract was not made with the master of the ship but by the ship's owner."

A maritime lien for wharfage arises by operation of law whether the contract therefor is made by the master or the owner.

*Ex parte Easton*, 95 U. S., 68, 77.

The authority of the master is due to the fact that he is the agent of the owner, and his acts are the owner's acts in making contracts for the vessel. Chief Justice Marshall, in the opinion in the case cited, makes this quite clear when he said:

"The master is selected by the owner, as his agent, for the purpose, among others, of reporting the vessel on her coming into port."

3. The learned Court below also failed to follow the decisions of this Court by omitting to give full force and effect to the personality and legal entity of the vessel as separate from that of her owner or master. This legal entity is as distinct as and in most respects similar to that of a corporation. The contract sued on was the vessel's contract, and it is immaterial whether the owner or the master spoke for her in making it.

"She acquires a personality of her own; *becomes competent to contract, and is individually liable for her obligations*, upon which she may sue in the name of her owner, and be sued in her own name. Her owner's agents may not be her agents, and her agents may not be her owner's agents. *The China*,

7 Wall., 53; *Thorp v. Hammond*, 12 Wall., 408; *Workman v. New York City*, 179 U. S., 552; *The Little Charles*, 1 Brock, 347, 354; *The John G. Stevens*, 170 U. S., 113, 120; *Homer Ramsdell Co. v. Comp. Gen. Trans.*, 182 U. S., 406. She is capable, too, of committing a tort, and is responsible in damages therefor. She may also become a *quasi* bankrupt; may be sold for the payment of her debts, and thereby receive a complete discharge from all prior liens, with liberty to begin a new life, contract further obligations, and perhaps be subjected to a second sale." (Italics ours.)

*Tucker v. Alexandroff*, 183 U. S., 424, 438.

Judge Hughes, writing in 26 *Cyclopedia of Law*, 749, cites this and other decisions of this Court as authority for the following statement of the Maritime Law:

"Under the American rule as finally established the vessel is itself looked on as a responsible being; and a maritime lien attaches directly, independent of questions of ownership or agency, the liability of the ship as such being the main thing, and the question of ownership being incidental. Hence such a lien attaches to the vessel, even in cases where the owners are not personally responsible, and even for the acts of persons not bearing the relation of agent to the owners."

The service having been rendered the vessel, and being a kind of service impossible of rendition to a natural person, the law implies a promise by her to pay, and the presumption is that she is the principal contractor and is primarily liable. The fact that her owner promised to pay is without significance, because under the law both the owner and the vessel were liable. Even if the owner had given a note or bill of exchange for the wharfage, the lien would continue until actual payment had been made.

*The Emily Souder*, 17 Wall., 666.

The opinion states that the facts in this case are in many respects similar to those in the case of *The Advance*, 60 Fed., 766, affirmed 71 Fed., 987. But the essential facts are quite different. In that case the contract was for the "entire use" of the pier "for any and all purposes" by the corporation itself and any or all of its fleet of several vessels and by its patrons. It was impossible to separate the wharfage from other things for which a vessel could not be liable. In this case the pier was furnished for the exclusive use and benefit of one particular vessel for discharging. No services are included except such as are necessarily incident to wharfage, that is, lights and the removal of dirt on the pier caused by the discharge of the cargo. That was a lease of the pier to be used in any way the lessee saw fit. This was a contract for the wharfage of one particular vessel, as wharfage is defined above.

If, in this case, payment is claimed for any service for which the vessel is not liable, it is easily separable from the amount due for wharfage for which the vessel is liable. The inclusion in a claim against a vessel of items for which the vessel is not liable does not defeat items for which the vessel is liable. In *The St. Jago de Cuba*, 9 Wheat, 409, the claim was for repairs but included an item for wharfage. This Court denied a lien for the repairs, but allowed a lien for the wharfage item.

4. Furthermore, the learned Court below failed to follow the decisions of this Court in denying a lien for wharfage because it did not affirmatively appear that credit was not given the vessel. The Court below said (R., 215):

"In this case the credit was not given to the ship. . . ."

The rule as to proof of credit to the vessel was never

applicable except to claims of materialmen for "repairs, supplies and other necessities."

"Those are commonly called materialmen, whose trade is to build, repair, or equip ships, or to furnish them with tackle and provision (necessary in any kind)."

*The Neptune*, 3 Hagg., 129, 142.

This rule as to proof of credit was abolished even as to the claims of materialmen by the Maritime Liens Act of June 23, 1910, and the Merchant Marine Act of June 5, 1920, amending same. It was never applicable in claims for wharfage, towage, pilotage, salvage and seamen's wages, which are services necessarily rendered directly to the vessel as incidents of her *navigation or operation*, as distinguished from her *outfitting*.

This distinction was recognized by this Court as early as the case of *The St. Jago de Cuba*, 9 Wheat., 409, in which there was a claim for repairs which was denied as a lien against the vessel, and also a claim for wharfage which was allowed as a lien, this Court saying:

"There is, however, one item in this account, to the amount of 300 or 400 dollars, which is certainly good against all the world. This was for wharfage  
\* \* \*."

The case of *The St. Jago de Cuba*, *supra*, is cited along with other cases, by District Judge Benedict, in *The Kate Tremaine*, 5 Ben., 60; Fed. Cas. 7622, in which he said:

"Thus far, this doctrine has been applied by the Supreme Court only to the contracts of materialmen. The present is not the case of a materialman, but of a wharfinger. A wharfinger is not a materialman. His demand is of a different character, and is given a different rank in the order of payment. This has been several times adjudged."

This distinction is thus stated by Judge Hughes in 26 *Cyclopedia of Law*, 766:

"As to all maritime liens except those of material-men, the rendition of the service to the vessel or the bringing her into such relations with any one as creates a maritime cause of action against her impresses upon her a maritime lien irrespective of questions of credit or ownership."

### SECOND POINT.

**Under the Merchant Marine Act of June 5, 1920, the petitioner had a maritime lien on the Steamship "Poznan" for the wharfage services rendered her.**

The Court below denied the petitioner a lien under the general maritime law because it did not appear that the wharfage was furnished on the credit of the vessel. This was in effect a decision that wharfage is not a necessary within the meaning of the Merchant Marine Act of 1920. It is true the Court below (Rec., p. 218) declined to express an opinion on this point, because it was considered immaterial as to wharfage accruing while the vessel was in *custodia legis*, which the opinion says was "practically" the entire period for which the bill was rendered. But *some* wharfage *did* accrue prior to the arrest of the vessel. Therefore, as to the part of the wharfage accruing prior to the arrest, the Court below in effect held that the Act of 1920 afforded no protection. And if the petitioner is correct in the contention that a valid lien having once attached is not terminated by the mere arrest, then said decision affects the whole amount claimed.

However, the Act has not been construed by this Court in this respect. The question involved is one of general importance, is of constant recurrence, and should be settled by this Court to end the conflict and confusion in

the lower courts as to the proper interpretation of the Act. The weight of judicial opinion seems to be that the Act is applicable to wharfage and similar services, and therefore that it is not necessary to allege or prove that credit was given the vessel when the service was rendered on the order of the owner.

The Act of 1920 provides:

"Subsection P. Any person furnishing *repairs, supplies, towage, use of drydock or marine railway, or other necessities*, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel." (Italics ours.)

Act of June 5, 1920, C. 250, Sec. 30, Subsec. P.

The Maritime Liens Act of June 23, 1910, contained a similar provision, but the language was "*repairs, supplies, or other necessities, including the use of drydock or marine railway.*"

"Any person furnishing repairs, supplies, or other necessities, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel."

Act of June 23, 1910, Ch., 373, 36 Stat. L. 604.

In *Piedmont Coal Co. v. Seaboard Fisheries Co.*, 251 U. S., 1, this Court made clear the purpose of the Act of 1910, which was to do away with the necessity of alleging and proving credit to the vessel when

these things were furnished her in her home port or were ordered by her owner. The phrase "repairs, supplies and other necessities" had acquired a definite technical meaning, and it was held that it did not include wharfage, but was restricted to those things furnished by materialmen, that is, to those things used in *outfitting* a vessel, and did not include those things necessarily incident to the *navigation* or *operation* of the vessel.

The change in the language in the Act of 1920 is significant. By the inclusion of the word "towage" and placing the phrase "and other necessities" at the end of the series, the meaning of such phrase was enlarged, and under the doctrine of *ejusdem generis* now includes wharfage, which, of course, is a necessity, and akin to towage and use of marine railway and drydock. As was said by this Court in *Ex parte Easton*, 95 U. S., 68, 75, wharves are well-nigh as necessary as ships. And in *The George W. Elder*, 159 Fed., 1005, a lien for "drydockage" was allowed under a "wharfage" statute.

Wharfage is "most analogous to towage, pilotage, or salvage."

*The Allianca*, 56 Fed., 609, 613.

Stevedoring is most analogous to seamen's services, since "formerly the work was done by the ship's crew."

*Atlantic Transport Co. v. Imbrovek*, 234 U. S., 52, 62.

The phrase "other necessities" as used in the Act of 1920 has lost its former technical meaning, and now includes things which are of the same general character of any of the items enumerated. It now includes not only those things necessary for the *outfitting* of a vessel, that is to supplies, repairs and other necessities of that class, but also those services necessarily incident to the *naviga-*



tion or operation of the vessel, such as towage, wharfage, pilotage, salvage, stevedoring and seamen's wages.

No good reason has been assigned for requiring a different rule of proof for wharfage, pilotage and the like from that required for towage and use of marine railway and dry dock.

Therefore by virtue of the Act of 1920 it was not necessary to allege or prove that credit was given the vessel.

### THIRD POINT.

**The petitioner had a maritime lien on the vessel for wharfage being furnished her and such lien was not terminated by operation of law upon her arrest by the marshal at the instance of a third party, who objected to her removal, when, by an order of the District Court, she was permitted to discharge her cargo on said wharf and deliver same to such third party and others, without any arrangement for her removal or wharfage elsewhere.**

The petitioner had a maritime lien for wharfage prior to the arrest of the vessel. Such lien survived the arrest and continued so long as the vessel was permitted, by those responsible for her arrest and by the Court, to continue to receive the benefit of wharfage under the contract with her owner. The lien and the service are inseparable; the one cannot be destroyed while the other continues.

In the case of *The Bold Buccleugh*, 7 Moore P. C., 267, quoted and followed in *The John G. Stevens*, 170 U. S., 113, speaking of a maritime lien it is said:

"This claim or privilege travels with the thing, into whosoever possession it may come. It is inchoate from the moment the claim or privilege at-

taches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached."

And this is true whether the lien arises in tort or contract. In *The John G. Stevens*, *supra* (p. 117), this Court held that "a maritime lien or privilege" constitutes "a present right of property in the ship, *jus in re*"; and further

"\* \* \* that a maritime lien is created as soon as the claim comes into being, has long been held to be equally applicable to all claims, which can be enforced in admiralty against the ship, whether arising out of tort or of contract. General Ins. Co. *v. Sherwood*, 14 How., 351, 363; *The Creole*, 2 Wall. Jr., 485, 518; *The Mayurka*, 2 Curtis, 72, 77; *The Young Mechanic*, 2 Curtis, 404; *The Kiersage*, 2 Curtis, 421; *The Yankee Blade*, 19 How., 82, 89; *The Rock Island Bridge*, 6 Wall., 213, 215; *The China*, 7 Wall., 53, 68; *The Siren*, 7 Wall., 152, 155; *The Lottawanna*, 21 Wall., 558, 579; *The J. E. Rumbell*, 148 U. S., 1, 10, 11, 20; *The Glide*, 167 U. S., 606."

The Court below decided that no maritime lien could *arise*, that is originate, while the vessel was in *custodia legis*. Assuming that this is true when the vessel is in custody of the law in the full and proper meaning of that term, that is, when it is withdrawn from maritime commerce, it by no means follows that a maritime lien, which has once attached and which is a privilege given by the maritime law to a creditor as an incident of the contract of service, is terminated by the arrest, when, at the request or by the consent of those responsible for the arrest, the Court permits the vessel to continue to receive the service contracted for. To the extent that the vessel, after her arrest, is thus permitted to pursue her

ordinary business and discharge her cargo, the custody of the law is relaxed and those responsible for the arrest waive the benefits of the custody of the law and the lien continued.

In *The Young America*, 30 Fed., 789, District Judge Brown said:

"The rule excluding subsequent liens cannot be extended to vessels that are not actually, as well as constructively, in the marshal's possession. Where a plaintiff, as in this case, obtains only a nominal arrest of a vessel, and virtually directs that she be left to pursue her ordinary business, with its attendant liabilities to other persons, in contract or in tort, he must be held to have waived the benefit of the custody of the court as a protection against other liens, and to be estopped from claiming, as against third persons, the exemptions that belong only to a vessel in actual custody."

To the same effect are the following cases:

*The St. Paul*, 271 Fed., 265;

*The J. S. Warden*, 175 Fed., 314;

*The Esteban de Antunano*, 31 Fed., 920;

*The Nisseogue*, 280 Fed., 174.

This question is one of great importance to shipping generally. The exact point here raised seems not to have been, but should be, settled by this Court.

#### FOURTH POINT.

Even if the petitioner had no maritime lien on the vessel remaining at and using its wharf while in the custody of the marshal, it was entitled to payment of the fair and reasonable value of the wharfage service thus rendered from the proceeds of the vessel in preference to the claim of the libellants at whose instance she was held in custody, who objected to her removal, and who by order of the Court were thus enabled to recover a part of her cargo and enforce their claims against her for damages for breach of contracts of affreightment.

The Court below departed from the usual course of judicial proceedings in holding that because the petitioner had no maritime or equitable lien upon the vessel it was not entitled to preferential payment from the proceeds of the vessel for the use of its wharf by the vessel in discharging and delivering her cargo to those responsible for her arrest and others. The petitioner never claimed or sought to enforce an equitable lien, but claimed preferential payment on the principles of right and justice, aside from its right to a maritime lien.

The hearing of the appeal below being a trial *de novo*, the Court should have decreed to the petitioner any relief to which it was justly entitled. On familiar principles of justice and fair dealing the Court should have decreed the preferential payment, from the proceeds of the vessel in the registry of the Court, of the fair and reasonable value of the wharfage service rendered while she was being held at the instance and for the benefit of the intervenor and other libellants, as a part of the expense of such custody; or on account of the inherent injustice and

impropriety of allowing a libellant, in using the process of the court to enforce his claim against the vessel, to enjoy the benefit of the use of another's property without deducting a fair compensation for such use from the proceeds of the vessel in the registry of the Court.

This question does not seem to have been, but should be, directly passed upon by this Court, on account of its general importance and constant recurrence.

### CONCLUSION.

**In the interest of uniformity in judicial interpretation and application of the decisions of this Court by the lower courts; for the benefit of maritime commerce generally, and in justice to the petitioner, the petition for a writ of certiorari should be granted.**

Dated, New York, October 9, 1925.

Respectfully submitted,

JOSEPH S. AUERBACH,  
CHARLES H. TUTTLE,  
ALEXANDER J. FEILD,  
*Counsel for the Petitioner.*

FILED

FEB 8 1927

WM. R. STANSBURY  
CLERK

Supreme Court of the United States

OCTOBER TERM—1926

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No. 229

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NEW YORK DOCK COMPANY

*Petitioner*

*against*

Steamship "POZNAN," her engines, etc., and  
JOHN B. HARRIS COMPANY

*Respondent*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

---

JOSEPH S. AUERBACH  
CHARLES E. HOTCHKISS  
CHARLES H. TUTTLE  
ALEXANDER J. FEILD  
*Counsel for Petitioner*



## SUBJECT INDEX

---

|  | PAGE |
|--|------|
| Jurisdiction of Court .....              | 1    |
| Official Reports of Opinions Below ..... | 1    |
| Statement .....                          | 2    |

### SUMMARY OF ARGUMENT.

|  |   |
|--|---|
| Synopsis of facts .....                | 5 |
| The Opinions of the Courts Below ..... | 5 |
| The Petitioner's Contentions .....     | 6 |

### THE ARGUMENT.

|  |    |
|--|----|
| POINT I.—The petitioner's claim for wharfage furnished the Steamship <i>Poznan</i> after her arrest and while she was in <i>custodia legis</i> , is privileged under the General Maritime Law as an "expense of justice" and is a lien upon the vessel and her proceeds .....                      | 10 |
| The case of the <i>St. Paul</i> exactly in point.....  | 12 |
| Wharfage as an "expense of justice" has highest rank of privilege .....  | 16 |
| No express agreement by marshal necessary..  | 19 |
| The custody of receivers .....   | 23 |
| Respondent estopped from claiming proceeds as against petitioner .....   | 25 |
| POINT II.—The petitioner's claim for wharfage furnished after the arrest of the vessel is privileged under the General Maritime Law for the further reason that it was a necessary expense of her operation while in custody, incurred by consent of the respondent and by permission of the Court | 28 |



|  | PAGE |
|--|------|
| The correct rule as to maritime liens while vessel is in <i>custodia legis</i> .....   | 29   |
| Cases distinguished .....  | 31   |
| Petitioner's contract expressly for wharfage..   | 36   |
| Respondent has adopted rule of law contended for by petitioner .....   | 39   |
| POINT III.—Under the General Maritime Law the petitioner's claim for wharfage is a privileged debt against the vessel and her proceeds notwithstanding (1) the wharfage was furnished under a contract with her owner instead of her master; (2) there was no agreement by the parties that a lien should arise, and (3) there is no proof of credit to the vessel ..... | 40   |
| Vessel bound by contract of either her owner or her master .....   | 41   |
| Maritime lien never created by agreement...  | 43   |
| The vessel a capable legal entity .....  | 44   |
| Proof of credit to vessel never necessary in claiming wharfage .....   | 46   |
| POINT IV.—Under the Merchant Marine Act of June 5, 1920, the petitioner is entitled to a maritime lien on the vessel for the wharfage services rendered her .....  | 48   |
| POINT V.—Both under the General Maritime Law and under the Merchant Marine Act of June 5, 1920, the petitioner's lien for wharfage arose against the vessel before she was arrested and such lien was not terminated by operation of law upon her arrest .....   | 52   |
| POINT VI.—The question of an "equitable lien" not an issue in this case .....  | 54   |
| CONCLUSION .....   | 56   |

## SUBJECT INDEX

---

|  | PAGE |
|--|------|
| Jurisdiction of Court .....              | 1    |
| Official Reports of Opinions Below ..... | 1    |
| Statement .....                          | 2    |

### SUMMARY OF ARGUMENT.

|  |   |
|--|---|
| Synopsis of facts .....                | 5 |
| The Opinions of the Courts Below ..... | 5 |
| The Petitioner's Contentions .....     | 6 |

### THE ARGUMENT.

|  |    |
|--|----|
| POINT I.—The petitioner's claim for wharfage furnished the Steamship <i>Poznan</i> after her arrest and while she was in <i>custodia legis</i> , is privileged under the General Maritime Law as an "expense of justice" and is a lien upon the vessel and her proceeds .....                      | 10 |
| The case of the <i>St. Paul</i> exactly in point.....  | 12 |
| Wharfage as an "expense of justice" has highest rank of privilege .....  | 16 |
| No express agreement by marshal necessary..  | 19 |
| The custody of receivers .....   | 23 |
| Respondent estopped from claiming proceeds as against petitioner .....   | 25 |
| POINT II.—The petitioner's claim for wharfage furnished after the arrest of the vessel is privileged under the General Maritime Law for the further reason that it was a necessary expense of her operation while in custody, incurred by consent of the respondent and by permission of the Court | 28 |

|  | PAGE |
|--|------|
| The correct rule as to maritime liens while vessel is in <i>custodia legis</i> .....   | 29   |
| Cases distinguished .....  | 31   |
| Petitioner's contract expressly for wharfage ..  | 36   |
| Respondent has adopted rule of law contended for by petitioner .....   | 39   |
| <b>POINT III.</b> —Under the General Maritime Law the petitioner's claim for wharfage is a privileged debt against the vessel and her proceeds notwithstanding (1) the wharfage was furnished under a contract with her owner instead of her master; (2) there was no agreement by the parties that a lien should arise, and (3) there is no proof of credit to the vessel ..... | 40   |
| Vessel bound by contract of either her owner or her master .....   | 41   |
| Maritime lien never created by agreement...  | 43   |
| The vessel a capable legal entity .....  | 44   |
| Proof of credit to vessel never necessary in claiming wharfage .....   | 46   |
| <b>POINT IV.</b> —Under the Merchant Marine Act of June 5, 1920, the petitioner is entitled to a maritime lien on the vessel for the wharfage services rendered her .....  | 48   |
| <b>POINT V.</b> —Both under the General Maritime Law and under the Merchant Marine Act of June 5, 1920, the petitioner's lien for wharfage arose against the vessel before she was arrested and such lien was not terminated by operation of law upon her arrest .....   | 52   |
| <b>POINT VI.</b> —The question of an "equitable lien" not an issue in this case .....  | 54   |
| <b>CONCLUSION</b> .....  | 56   |

## TABLE OF CASES.

|  | PAGE           |
|--|----------------|
| <i>America, The</i> , Fed. Cas., 288 .....                                     | 18             |
| <i>Allegheny, The</i> , 85 Fed., 463 .....                                     | 18, 19         |
| <i>Adams v. Hopkins</i> , 5 Johns., 252 .....                                  | 27             |
| <i>Andrew J. Smith, The</i> , 263 Fed., 1001 .....                             | 32, 33         |
| <i>Augustine Kobe, The</i> , 37 Fed., 696 .....                                | 34             |
| <i>Astoria, The</i> , 281 Fed., 618 .....                                      | 34             |
| <i>Advance, The</i> , 60 Fed., 766 (aff'd 71 Fed., 987) .....                  | 36             |
| <i>Allan Wilde, The</i> , 264 Fed., 291 .....                                  | 38             |
| <i>Altianca, The</i> , 56 Fed., 609 .....                                      | 51             |
| <i>Atlantic Transport Co. v. Imbrovek</i> , 234 U. S., 52 .....                | 51             |
| <i>Beard v. Marine Lighterage Corporation</i> , 296 Fed.,<br>146 .....         | 31             |
| <i>Barnstable, The</i> , 181 U. S., 464 .....                                  | 44             |
| <i>Bird of Paradise, The</i> , 5 Wall., 545 .....                              | 47             |
| <i>Bold Buccleugh, The</i> , 7 Moore P. C., 267 .....                          | 52             |
| <i>Burton S. S. Co., In re</i> , 3 Fed. (2nd), 1015 .....                      | 49             |
| <i>C. Vanderbilt, The</i> , 86 Fed., 785 .....                                 | 32, 31         |
| <i>Carrol v. Bancker</i> , 43 La. Ann., 1078 .....                             | 43             |
| <i>China, The</i> , 7 Wall., 53 .....  | 44             |
| <i>Estaban de Anunano, The</i> , 31 Fed., 920 .....                            | 33             |
| <i>Erinach, The</i> , 7 Fed., 231 .....  | 34             |
| <i>Easton, Ex parte</i> , 95 U. S., 68 .....                                   | 42, 47, 51     |
| <i>Emily Souder, The</i> , 17 Wall., 666 .....                                 | 43, 47         |
| <i>East River Co., In re</i> , 266 U. S., 355 .....                            | 44             |
| <i>Free Trader, The</i> , 1 Brown Adm., 72; Fed. Cas., 5091 .....              | 18             |
| <i>F. Merwin, The</i> , 10 Ben., 403; Fed. Cas., 4893 .....                    | 19             |
| <i>Fortuna, The</i> , 206 Fed., 573 .....                                      | 32, 33         |
| <i>Georgeanna, The</i> , 31 Fed., 405 .....                                    | 19, 25, 26, 27 |
| <i>Gadski-Tauscher v. Graff</i> , 44 Misc., 418 .....                          | 27             |
| <i>General Smith, The</i> , 4 Wheat, 438 .....                                 | 45             |
| <i>Guy, The</i> , 1 Ben., 112 (aff'd 9 Wall., 758) .....                       | 48             |
| <i>George W. Elder, The</i> , 159 Fed., 1005 .....                             | 51             |
| <i>Gray's Harbor Stevedoring Co. v. United States</i> , 298<br>Fed., 159 ..... | 49             |

|   | PAGE                   |
|---|------------------------|
| Harney <i>v. The Sydney L. Wright</i> , Fed. Cas., 6082-a . . .   | 12                     |
| Homer Ramsdell Transportation Co. <i>v. La Comp.<br/>Gen. Transatlantique, The</i> , 182 U. S., 406 . . . . . | 44                     |
| <i>J. E. Rumbell, The</i> , 148 U. S., 1 . . . . .  | 43                     |
| <i>John G. Stevens, The</i> , 170 U. S., 113 . . . . .  | 44, 53                 |
| <i>Kate Tremaine, The</i> , 5 Ben., 60; Fed. Cas., 7622 . . .   | 34, 38, 46             |
| <i>Kimball, The</i> , 3 Wall., 37 . . . . .   | 47                     |
| <i>Little Charles, The</i> , 1 Brock., 347 . . . . .  | 40, 41, 42             |
| Meddaugh <i>v. Wilson</i> , 151 U. S., 333 . . . . .  | 23                     |
| Moran <i>v. Sturges</i> , 154 U. S., 256 . . . . .  | 21                     |
| Mealy, <i>Re</i> , 2 N. B. R., 128 . . . . .  | 27                     |
| <i>Mary K. Campbell, The</i> , 31 Fed., 840 . . . . .   | 33                     |
| <i>Muskegon, The</i> , 275 Fed., 348 . . . . .  | 49                     |
| <i>Neptune, The</i> , 252 Fed., 129 . . . . .   | 19, 46                 |
| <i>Novelly, The</i> , 9 Ben., 195; Fed. Cas., 10368 . . . . .   | 21, 22                 |
| <i>Nisseogue, The</i> , 280 Fed., 171 . . . . .   | 31, 34, 35             |
| <i>Norwich Co. v. Wright</i> , 13 Wall., 104 . . . . .  | 45                     |
| Old Dominion S. S. Co. <i>v. City of New York, et al.</i> ,<br>286 Fed., 155 (aff'd 286 Fed., 157) . . . . .  | 37                     |
| <i>Phebe, The</i> , 1 Ware, 354; Fed. Cas., 11065 . . . . .   | 11, 16, 17, 18         |
| <i>Paxson v. Cunningham</i> , 63 Fed., 132 . . . . .  | 23                     |
| <i>Palmyra, The</i> , 12 Wheat., 1 . . . . .  | 26                     |
| <i>Pulaski, The</i> , 33 Fed., 383 . . . . .  | 32, 33                 |
| <i>Philomena, The</i> , 200 Fed., 873 . . . . .   | 34                     |
| <i>Piedmont Coal Co. v. Seaboard Fisheries Co.</i> , 254<br>U. S., 1 . . . . .                                | 36, 50                 |
| <i>Resolute, The</i> , 168 U. S., 437 . . . . .   | 23, 24                 |
| Ruhloff <i>v. Colts</i> , 174 N. Y. S., 159 . . . . .   | 27                     |
| <i>Rathlin Head, The</i> , 292 Fed., 867 . . . . .  | 38                     |
| <i>Rupert City, The</i> , 213 Fed., 263 . . . . .   | 43                     |
| <i>Rebecca, The</i> , 1 Ware, 187; Fed. Cas., 11619 . . . . .   | 45                     |
| <i>St. Paul, The</i> , 271 Fed., 265 . . . . .  | 12, 13, 14, 15, 20, 31 |
| <i>Shrewsbury, The</i> , 69 Fed., 1017 . . . . .  | 38                     |
| <i>St. Jago de Cuba, The</i> , 9 Wheat., 409 . . . . .  | 38, 46                 |

# INDEX

v

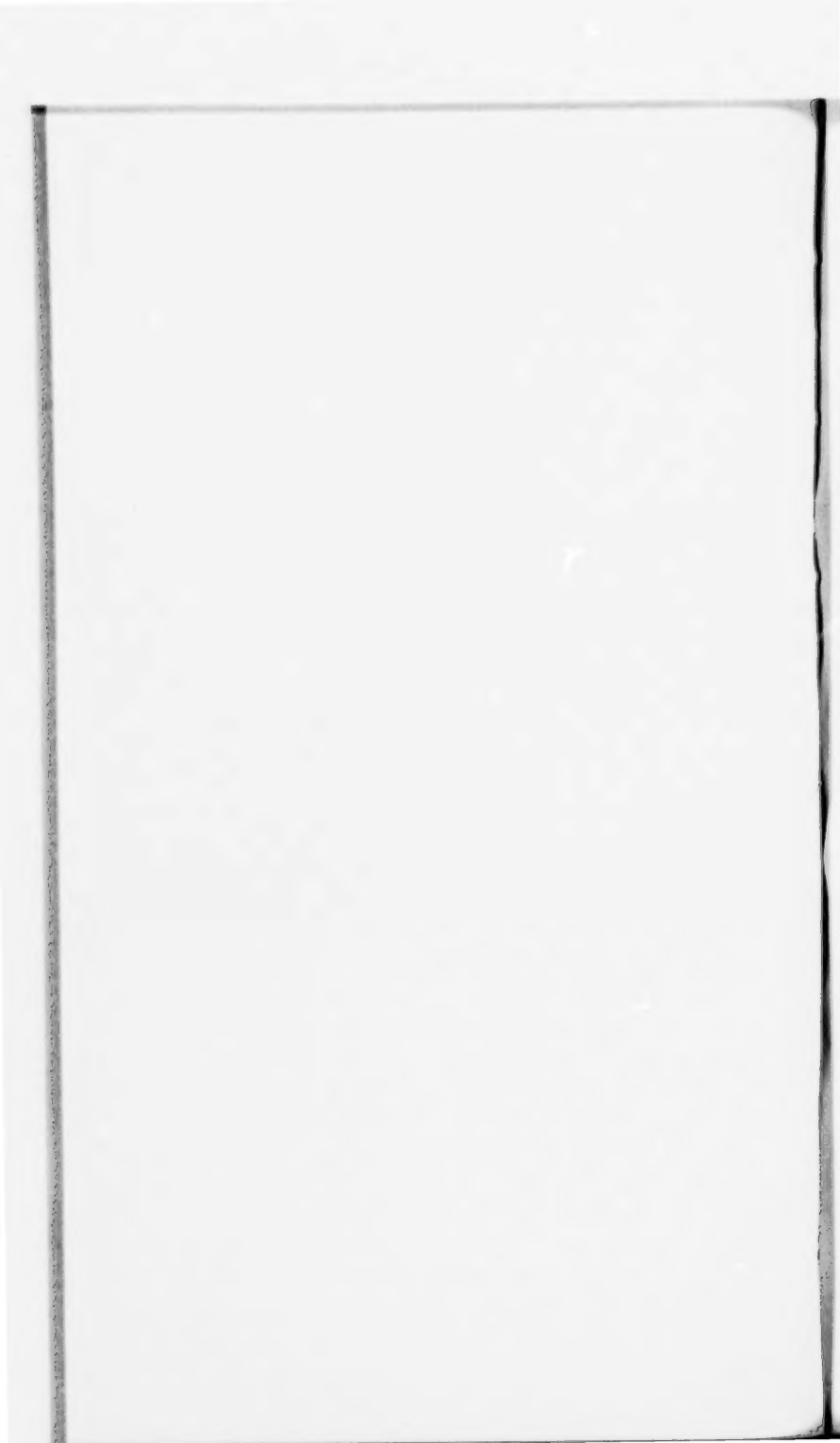
|   | PAGE       |
|---|------------|
| <i>Saratoga, The</i> , 201 Fed., 952 .....  | 43         |
| <i>Schuchardt v. Bobbidge</i> , 19 How., 239 .....                                  | 43         |
| <i>Scotland, The</i> , 105 U. S., 21 .....  | 45         |
| <i>St. Lawrence, The</i> , 1 Black, 522 .....                                       | 48         |
| <i>Suelco, The</i> , 286 Fed., 286 .....  | 49         |
| <i>Susquehanna, The</i> , 3 Fed. (2nd), 1014 .....                                  | 49         |
| <i>Taylor v. Carryl</i> , 20 How., 583 .....  | 11, 34     |
| <i>Tucker v. Alexandroff</i> , 183 U. S., 421 .....                                 | 11, 22, 44 |
| <i>Trustees v. Greenough</i> , 105 U. S., 527 .....                                 | 23         |
| <i>United States v. Certain Subfreights of S. S. Neponset</i> , 300 Fed., 981 ..... | 49         |
| <i>Williamette Valley, The</i> , 66 Fed., 565 .....                                 | 23         |
| <i>West Haven, The</i> , 297 Fed., 534 .....  | 49         |
| <i>Young America, The</i> , 30 Fed., 789 .....                                      | 30, 54     |

## TEXT BOOKS.

|                                 |    |
|---------------------------------|----|
| 38 Corpus Juris, 1198 .....     | 44 |
| 26 Cyclopedia of Law, 766 ..... | 47 |

## STATUTES.

|   |                        |
|---|------------------------|
| New York Civil Practice Act of May 21, 1920 ..... | 27                     |
| Merchant Marine Act of June 5, 1920 .....         | 45, 48, 49, 50, 51, 52 |
| Maritime Liens Act of June 23, 1910 .....         | 49, 50                 |



# Supreme Court of the United States

OCTOBER TERM, 1926.

No. 229.

NEW YORK DOCK COMPANY,  
Petitioner,

*against*

Steamship "POZNAN," her engines, etc.,  
and JOHN B. HARRIS COMPANY,  
Respondents.

## PETITIONER'S BRIEF.

This cause is before the Court on writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, granted on November 23, 1925, on the petition of New York Dock Company, for review of the decree of that Court, dated July 23, 1923, and reported as *The Poznan*, 9 Fed. (2nd), 838, reversing the interlocutory decree of the United States District Court for the Southern District of New York, dated July 13, 1923, and reported as *The Poznan*, 297 Fed., 345, and the final decree of said District Court, dated June 17, 1924 (R., 138), and not reported, which decreed to the petitioner preferential payment from the proceeds of the Steamship *Poznan* of approximately \$20,000, in its libel *in rem* for wharfage furnished said vessel.

The jurisdiction of this Court is based on the Judicial Code sections 128 and 240, as amended by the Act of February 13, 1925.



### Statement.

All of the facts are stipulated or were found by a special commissioner, whose findings were confirmed by the District Court and accepted by the Circuit Court of Appeals, and only questions of law are presented for consideration by this Court.

On November 30, 1920, New York Dock Company, being the owner of Pier 6 on the Brooklyn shore of East River, made a contract with the Polish-American Navigation Corporation, a Delaware Corporation, owner of the Steamship *Poznan*, for the use of said pier by said vessel for discharging; her said owner agreeing to pay therefor \$250 per day, said charge to begin at 7 o'clock A. M. in December 1, 1920, and continue up to the time the vessel and/or all cargo was removed, and in addition thereto the incidental expense of lights and pier cleaning at certain specified rates (R., 8-9).

During the afternoon of December 2, 1920, the *Poznan* arrived and under and pursuant to said contract made by her owner was made fast to said Pier 6. Thereafter and on the same day, at the instance of certain libellants, whose libels were for recovery of the vessel's cargo and for damages for breach of contracts of affreightment, said vessel was arrested by the United States Marshal for the Southern District of New York, who took her into his custody, but allowed her to remain fast to said Pier 6 (R., 9). These libels were afterwards consolidated under the title of *Joseph H. Davis, et al. against Steamship Poznan, et al.*

Thereafter on December 11, 1920, on the application of one of said libellants the District Court ordered the delivery of a certain part of said cargo to said libellant,

and made said order applicable to all libellants claiming parts of said cargo (R., 9, 14). Said cargo was then discharged on Pier 6 and received by the libellants in the consolidated cause, including John B. Harris Company, the respondent herein.

Before the cargo was fully discharged, the charterer of the vessel, Acme Operating Corporation, applied to the District Court for leave to have the vessel moved to another pier. At the request of the libellants in the consolidated cause, including the respondent herein, this application was denied (R., 36).

The cargo was completely discharged by February 18, 1921; delivery of the cargo from the pier was completed March 1, 1921; the vessel remained fast to the pier until and including March 11, 1921, when it was moved to another pier (R., 9).

In the meantime, the marshal having declined to pay the Dock Company's bill for wharfage without an order by the Court (R., 11-13), the Dock Company, on April 9, 1921, filed its libel against the vessel (R., 1, 3). On April 17, 1922, by order of the District Court the libellants in the consolidated cause were permitted to intervene herein (R., 4). On April 15, 1922, John B. Harris Company, one of the libellants in the consolidated cause served notice of intervention (R., 6) and filed its answer herein, denying the allegations of the libel and praying its dismissal on the ground that the wharfage was not furnished on the credit of the vessel, and further that during the time the wharfage is alleged to have been furnished the vessel was in the custody of the marshal (R., 6).

Thereafter the vessel was sold pursuant to an order in the consolidated cause, and the proceeds paid into the registry of the court. Although the marshal had declined

to pay the wharfage claimed by New York Dock Company, he included it in his bill of costs and expenses for keeping the vessel and charged his commissions on the amount thereof (R., 21, 19). The Court disallowed this wharfage item as a disbursement by the marshal, but "without prejudice to any rights of the New York Dock Company to have recourse against the proceeds if any such right there be" (R., 22-25). The Dock Company then obtained from the libellants in the consolidated cause a stipulation (in effect a stipulation for value) for the payment of such recovery as it might have herein (R., 131, 132), and has since prosecuted its libel, which is the cause now before this Court.

The District Court being of the opinion (R., 37-40) that a recovery herein could not be had at the alleged contract price, but could be had on *quantum meruit*, entered an interlocutory decree (R., 41), appointing a special commissioner to take proof and report the reasonable value of the benefit enjoyed by the libellants in the consolidated cause from the wharfage and incidental services rendered the vessel and the amount remaining due. The special commissioner reported that such reasonable value was the same as the contract price and that the balance due was \$16,628.70 and interest (R., 132-135). The report of the special commissioner was confirmed (R., 137) and a final decree was entered in accordance therewith (R., 138).

On appeal the Circuit Court reversed the interlocutory and the final decree of the District Court (R., 145-166), and a petition for a rehearing was denied (R., 167). The petition for writ of certiorari was granted November 23, 1925 (R., 167).

## **SUMMARY OF ARGUMENT.**

### **Synopsis of Facts.**

The vessel began the use of the petitioner's wharf under a contract by her owner for its use by her. Shortly thereafter libels were filed against her by the respondent and others, who claimed possession of her cargo and damages for breach of contracts of affreightment. Under process issued in these libels she was arrested and taken in custody by the marshal, who allowed her to remain as she was at the petitioner's wharf, and by order of the Court and consent of the respondent and the other libellants she was permitted to discharge her cargo there and there to deliver it to them. The petitioner then filed its libel against the vessel for wharfage at the contract price. The District Court decreed it the reasonable value of the use of the wharf, and on a reference such reasonable value was found to be the same as the contract price, and final decree was entered accordingly. The Circuit Court of Appeals reversed the decrees of the District Court, and the cause is now before this Court for the review of such decree of reversal.

### **The Opinions of the Courts Below.**

The District Court held that the petitioner was not entitled to a maritime lien for the wharfage furnished while the vessel was in custody, but decreed the petitioner preferential payment of such wharfage from the proceeds of the vessel on principles of justice and equity.

The Circuit Court of Appeals, in reversing the decrees of the District Court, held that the petitioner had no maritime lien on the vessel for wharfage furnished *after* her arrest by the marshal, because she was then in

*custodia legis* and therefore withdrawn from navigation; that the petitioner had no maritime lien for the wharfage furnished *before* her arrest, because such wharfage was under a contract with the owner of the vessel instead of with her master and there was no express agreement or understanding that such lien should arise, and that therefore such wharfage was not furnished on the credit of the vessel, but on the personal credits of her owner. Furthermore, the Circuit Court of Appeals interpreted the opinions of the District Court as basing the decree for preferential payment on the ground that the petitioner had an "equitable lien" on the vessel, as that term is commonly used, and stressed the fact that the petitioner had no such lien; that such lien could not take precedence over a maritime lien, and that therefore the relief granted was improper.

### **The Petitioner's Contentions.**

On behalf of the petitioner it is contended that the theory on which the decree of reversal is based is erroneous for the following reasons:

I. The petitioner's claim for wharfage furnished while the vessel was in *custodia legis* is a privileged debt against the vessel and her proceeds as a necessary incident of such custody. It is an incident of the prosecution and has been appropriately called an "*expense of justice*." Had it been actually paid by the marshal, he could have charged it in his bill against the proceeds of the vessel; since it was not so paid it may be enforced by libel *in rem* or petition against the proceeds. It is on the same footing as the marshal's fees and is a debt of the highest rank of

privilege. The petitioner should not be deprived of compensation for the use of its property simply because it did not demand payment from the marshal in advance. The fund primarily liable is still under the control of the Court, which should see that justice is done (see Point I, p. 10).

II. The petitioner's claim for wharfage furnished while the vessel was in *custodia legis* is a privileged debt against her and her proceeds for the further reason that it was a necessary *expense of operation* in the discharge of her cargo, which, by consent of the respondent and by order of the Court, was permitted while she was in custody. When the owner of a vessel withdraws her from maritime commerce and stores her away or uses her for non-maritime purposes she ceases to be a subject of maritime jurisdiction and no maritime lien can arise against her. The same is true when she goes into the hands of a sheriff and by operation of law passes out of the maritime jurisdiction, ceasing to be a legal entity and becoming a mere chattel. But when she is in custody of the marshal, she is still a vessel, a legal entity, and to the extent that she is permitted to pursue her usual maritime activities she is liable for the services rendered her as necessary incidents of such activities. The true test of exemption from maritime liens is not whether the vessel is in custody of the law, but whether she has ceased to act like a vessel (see Point II, p. 28).

III. Under the general maritime law the petitioner's claim for wharfage is a privileged debt against the vessel and her proceeds notwithstanding—(1) the wharfage was furnished under a contract with her owner instead of

her master; (2) there was no agreement by the parties that a lien should arise, and (3) there is no proof of credit to the vessel.

1. The lien for wharfage arises whether the contract therefor is with the owner or the master. The master is selected by the owner as his agent; and the agent can have no greater authority than his principal. The contract is primarily the contract of the vessel as a legal entity and either is authorized to speak for her in making it.

2. A maritime lien arises solely by operation of the maritime law as an incident of the service. Indeed, the parties cannot by agreement create a maritime lien. A lien created by agreement would be a mortgage or pledge and would be subordinate to maritime liens.

3. The rule as to proof of credit to the vessel never applied to claims for wharfage, but has always been restricted to claims of materialmen for "repairs, supplies, and other necessities"; that is, to claims for those things incident to the *outfitting* of the vessel; and not to those things incident to her *operation* and which are rendered directly to her as a going concern, such as wharfage, salvage, seamen's wages and the like (see Point III, p. 40).

IV. Under the Merchant Marine Act of June 5, 1920, the petitioner is entitled to a maritime lien on the vessel and her proceeds for the wharfage services rendered her. While proof of credit to the vessel was never necessary to give rise to a maritime lien for wharfage, because it was not included in the technical phrase "*repairs, supplies and other necessities*," all doubt has been removed

by that Act, which dispensed with such proof of credit when the claim is for furnishing "*repairs, supplies, towage, use of drydock or marine railway, or other necessities.*" This phraseology includes not only those things incident to the *outfitting* of a vessel and technically known as "repairs, supplies and other necessities," but also includes those things incident to the *operation* of a vessel. Under the familiar rule of *ejusdem generis* wharfage is included because it has been held to be "most analogous to towage, pilotage, or salvage" (see Point IV, p. 48).

V. Both under the general maritime law and under the Merchant Marine Act of June 5, 1920, the petitioner's lien for wharfage arose against the vessel before her arrest, and such lien was not terminated by operation of law upon her arrest. The marshal is a custodian merely. His office is to preserve and not destroy rights. When the vessel was arrested she was using the petitioner's wharf under a contract made by her owner. This contract was not from day to day, but for the time the vessel and her cargo remained there. The marshal allowed her to remain where she was, made no new contract for her wharfage and did not undertake to terminate the existing contract. On the contrary, by order of the Court and consent of the respondent she was allowed to discharge and deliver her cargo there. The petitioner's lien attached before the arrest. It was an incident of the contract and the service thereunder. The vessel was permitted to receive the service contracted for and may not escape the lien. Therefore, neither by act of the parties nor by operation of law was the lien terminated (see Point V, p. 52).



VI. The question of an "equitable lien" is not an issue in this case. The Circuit Court of Appeals erred in basing its decree of reversal partly on the ground that the petitioner has no "equitable lien" in the sense that term is commonly used. It is conceded that the petitioner has no such lien, and it is respectfully submitted that the District Court did not hold that it had. What the District Court held was that the petitioner was entitled to preferential payment from the proceeds of the vessel on principles of equity and justice and this is what was decreed. The reversal mistakes the form of the opinion for the substance of the decree (see Point VI, p. 54).

It is respectfully submitted that the foregoing contentions on behalf of the petitioner are amply supported by the following argument and the authorities cited.

## THE ARGUMENT.

### POINT I.

**The petitioner's claim for wharfage furnished the Steamship "Poznan" after her arrest and while she was in custodia legis is privileged under the General Maritime Law as an "expense of justice" and is a lien upon the vessel and her proceeds.**

The Circuit Court of Appeals held that the petitioner had no maritime lien for wharfage furnished the *Poznan* after her arrest, because she was in custody and withdrawn from navigation (R., 166). The learned Circuit Judge delivering the opinion of the Court said (R., 155):

"If the vessel is in *custodia legis* she is for the time being withdrawn from navigation and no maritime lien arises for wharfage charges incurred during the period she is so withdrawn."

This statement is too broad, and unless qualified it is erroneous. It is true if the custody is under a state law, because such law can take no cognizance of a ship as a legal entity, and for the time being it is entirely withdrawn from the maritime law and the admiralty jurisdiction. It is a mere chattel of wood and iron floating on the surface of the waters. *Taylor v. Carryl*, 20 How., 583. Such statement is erroneous if the custody is under the maritime law as administered by a court of admiralty, because such law knows a ship only as a legal entity—"a personality \* \* \* competent to contract and \* \* \* individually liable for her obligations." *Tucker v. Alexandroff*, 183 U. S., 424, 438. As such she is arrested, and such she remains while in custody; and if she is sold, she is sold as a ship. In no other capacity does the maritime law recognize her. When in such custody maritime liens may arise against her. The analogy between a ship as a legal entity and a corporation has been recognized by this Court (see Point III, p. 41).

A vessel may use a wharf in either of two ways: First, it may be used as a necessary incident to the administration of justice, when she is arrested and subjected to the satisfaction of the demands against her by a court of admiralty. The expense of a wharf when so used has been appropriately called an "expense of justice." *The Phebe*, 1 Ware (354), 360; Fed. Cas. 11065. Second, the wharf may be used as a necessary incident to the operation of the vessel as the chief agency of maritime commerce. In each case the service is rendered to the vessel

and the maritime law makes the price or value of such service a privileged debt against the vessel and her proceeds, whether she is in custody or not. This is what is confusingly called a maritime lien (*Harney v. The Sydney L. Wright*, Fed. Cas. 6082-a). It is simply the right to share in the proceeds of the vessel in preference to her owner and her owner's general creditors. It is a lien only in the sense that a corporation creditor has a lien on the corporate assets and a partnership creditor has a lien on the partnership assets. It is not a lien at all, but legal right to preferential participation in the assets of the legal entity. Therefore all maritime liens are the same except in the order of their preference, although the methods of enforcing such right may vary, as will be shown.

The question of the right to participate in the proceeds of a vessel for wharfage furnished her while in *custodia legis*, as an "expense of justice," is not new. The precise question had been decided in the Second Circuit before the instant cause arose.

#### **The Case of the "St. Paul" Exactly in Point.**

The case of *The St. Paul*, 271 Fed., 265, also decided by the Circuit Court of Appeals for the Second Circuit, is so exactly in point that it requires more than passing consideration. In that case, after the arrest of the vessel and while she was in custody of the marshal, by order of the Court and consent of the parties the marshal was

" \* \* \* authorized to permit Hudson Navigation Company to move the said steamship from her present anchorage to Pier 32, N. R., and to make an arrangement with the said Hudson Navigation Company for the discharge of (the cargo at said

pier); the amount of the cost of discharging, storing, and caring for the cargo to be subject to the approval of the court; the said Hudson Navigation Company to look to the said cargo for the payment of the cost of said discharging.' Accordingly the Hudson Company took charge of the ship, in the sense of directing where she should lie and removed the cargo until July 17, when the discharge was complete; but the pier alongside contained cargo for a long time afterwards."

From July 17, when the discharge was complete, to October 8, a period of 82 days, the vessel remained at the pier empty. Hudson Navigation Company, owner of the pier, claimed that under said consent order the cargo should stand the expense of wharfage for the whole time, including the 82 days the vessel remained there empty; but this claim was disallowed by an order which was not complained of. Hudson Navigation Company then presented to the marshal its bill made out against "*S. S. St. Paul* and her owners" for the wharfage for the period of 82 days, from July 17 to October 8, when the vessel remained at the pier empty. The marshal did not actually pay this bill, but included it in his bill of costs against the proceeds of the vessel. The District Court disallowed most of this item of the marshal's bill of costs on the theory that the vessel's use of the pier for most of the 82 days was caused by the Hudson Navigation Company's action in obtaining a stay of the order for the sale of the vessel. From the disallowance of this item Hudson Navigation Company appealed.

From the foregoing it clearly appears that during the whole of the time from the arrest of the vessel to October 8, when she was removed from the pier, she was in cus-

tody of the marshal, and that Hudson Navigation Company "took charge" of her only "in the sense of directing where she should lie"; that the vessel was relieved of the lien for wharfage during the period of discharging, by the consent order of the Court making the expense of discharging a charge against the cargo; and that the controversy was only over wharfage accruing entirely after July 17, when the discharge was completed and the consent order had ceased to be operative. It clearly appears further that the marshal did not authorize the berthing of the vessel at Pier 32 and did not promise to pay for her berth there and did not pay, and that she remained there without the order of the Court or the consent of the libellants. If it were possible to conceive of a case where there would be no maritime lien for wharfage furnished a vessel while in *custodia legis*, the case of the *St. Paul* would certainly be such case. And yet it was held that there was a maritime lien against the *St. Paul* and her proceeds of a superior rank and preferential payment from her proceeds was allowed. Circuit Judge HOUGH, delivering the opinion of the Court in the *St. Paul* case said:

"But this wharfage item is not even a 'disbursement,' for the marshal never authorized berthing the *St. Paul* at Pier 32, and never promised to pay for such berth—indeed, this is admitted. What he has done is this: He has presented in his bill the *demand of Hudson Company to be paid for services rendered the ship—a kind of service which might have been enforced by libel in rem or by petition against the proceeds of the res.*

"\* \* \* but we feel justified in treating the claim as it was below, viz. as a *demand for preferential payment*, or as an *asserted superior lien on the proceeds of the steamship.*" (Italics ours.)

The similarity of the facts in the *St. Paul* case and the case at bar is obvious. Precisely the same question was presented in each, and such was the conclusion reached by the District Court (R., 38, 40). But it is respectfully submitted that the Circuit Court of Appeals has decided the question in exactly opposite ways. If the learned Circuit Judge delivering the opinion of the Court had not so emphatically distinguished the two cases, the decision in the case at bar would undoubtedly have overruled the decision in the *St. Paul* case, but he said (R., 161):

"The learned judge who decided this case in the court below relied upon the decision of this court in *The St. Paul*, 271 Fed., 265. And counsel at the argument in this court told us that that case is on all fours with the case at bar, and fully sustains the decree below. We do not at all agree with any such conclusion. There is nothing in *The St. Paul* case which lends support to the doctrine now contended for. The question which the District Judge decided in the present case instead of being as he assumed the question which was decided in the *St. Paul*, is precisely the one which was not presented, or litigated, or decided in that case. The wharfage in that case was incurred pursuant to an order made by the court and with the consent of all the libelants. It was made in the only way in which a maritime lien can be (fol. 220) validly created against property in *custodia legis* namely by an order of the court."

The Circuit Court of Appeals by its reversal of the decree of the District Court has denied this petitioner a lien upon and preferential payment from the proceeds of the Steamship *Poznan* for the wharfage of the vessel while in custody of the marshal, notwithstanding the fact that

the *Poznan* remained at the petitioner's pier with the sanction of the Court and by consent of the parties.

Both of these decisions can not be right, and with great respect we propose to show that the decision in *The St. Paul* case was correct and that the decision in the case at bar was erroneous.

**Wharfage as an "Expense of Justice" has Highest Rank of Privilege.**

The case of *The Phebe*, 1 Ware (354); 360; Fed. Cas. 11065, is also exactly in point, and shows petitioner's claim to have the highest rank of privilege. In that case Judge WARE discusses with learning and clearness the character of the lien or privilege for wharfage furnished a vessel while in *custodia legis*. In that case the vessel was sold and the marshal did not himself pay for her wharfage while in his custody, but settled for it out of the proceeds and, after retaining his fees, paid the residue into the registry of the Court. Thereafter the proctor for the libellant moved for an order requiring the marshal to pay the whole proceeds into the registry. In granting this order the Court said:

"All persons having claims against them (the proceeds), of whatever kind they may be, must make them in Court, and the money is never paid out but to one who shows a legal right to it. The propriety of this practice is obvious, if it be considered only in reference to the *expenses of the prosecution*. *These expenses form a lien, or are a privileged debt against the property*. 1 Valin, Comm. p. 362. Cleirac, Jurisdiction de la Marine, art. 5, note 15. *All of the expenses of justice naturally stand in the same rank of privilege*. All

persons having claims of this kind have a right to look to the proceeds of the sale for their pay, and all are entitled to be paid concurrently. Now the case may happen in a protracted and expensive course of litigation, or the accidental destruction of a large part of the property arrested, that the whole proceeds of the sale may not be enough to pay the expenses of the suit. In such a case it would be inequitable for one to receive his pay in full, and for another to be turned over to a personal demand against the parties to the suit. Equity requires in such a case, and so is the law of the court, if the balance of the expenses is not obtained from the parties to the suit, who are liable for them, that the proceeds of the sale should be divided among the several claimants, *pro rata*.

"\* \* \* The officer who executes the precept for the sale, has no more authority to settle and pay one claim than another; he has no more authority to allow and pay any of the expenses which have accrued in the prosecution, than he has any other privileged debt. *The liens created in favor of these debts, do not differ from any other liens except in the rank of their privilege.*" (Italics ours.)

The lien for wharfage here referred to is not a possession lien, giving the wharfinger the right to detain the vessel until his debt should be paid, but the privilege or lien created by the maritime law. It may not be *enforced* by withdrawal of the vessel from the custody of the law and proceeding summarily or in a different jurisdiction; but the Court having jurisdiction will always respect this *jus in re* and grant relief on petition or libel of intervention or consolidation of libels. In the case just cited the Court said further:

"But in this case, after the vessel was arrested on process from the Court, she was in custody of the



law, and subject to the order of the Court, and continued to be so until she was sold. It cannot be admitted that the wharfinger, by permitting her to lie at his wharf, withdrew her from the custody of the law or the possession of the Court. His lien for wharfage, admitting it to exist, was not one which could be enforced by a detention of the vessel, but only by an application to the Court, and that not in exclusion, but in concurrence with other liens standing in the same degree of privilege."

For a long period of time this has been accepted as settled law, and is the common practice of the courts.

In *The America*, Fed. Cas. 288, the Court quotes Judge WARE in *The Phebe*, Fed. Cas. 11065:

"\* \* \* the learned judge was speaking of a claim for wharfage, accruing while the vessel was under arrest; and this claim, as one of the expenses of the legal proceedings, should, of course, have been paid concurrently with the other expenses of such proceedings."

In *The Free Trader*, 1 Brown Adm. 72; Fed. Cas. 5091, the Court said:

"The marshal is, by law, entitled to receive from the fund in Court the actual necessary expenses he has paid, or obligated himself to pay, and no more. His claim is like any other claim or lien on the fund in Court \* \* \*."

In *The Allegheny*, 85 F., 463, the question was whether a marshal, who had incurred large expenses in caring for and preserving a vessel in his custody, was entitled to reimbursement thereof out of the proceeds of her sale, without awaiting the final decree in the cause. It was held that he was, the Court saying:

"The marshal is obliged to pay the whole proceeds of the sale into the registry of the Court, but the law requiring him to do so was not intended to delay him in the recovery of his costs. The marshal was bailee of the property, and responsible for its safe delivery to the parties interested, and bound to answer in damages for the loss sustained through his fault or neglect. Whatever he has necessarily or properly expended for its preservation, he is entitled to recover. His claim is a preferred one. Its priority is not disputed by any one. The money deposited in the registry does not bear interest, and there does not appear to be any reason why the marshal should be compelled to submit to his loss and await a final decree in the cause which may be indefinitely postponed, at the whim of pleasure of the litigants, before receiving the costs which he has lawfully incurred in preserving the property."

To the same effect is *The Georgeanna*, 31 Fed., 405.

In *The F. Merwin*, 10 Ben., 403; Fed. Cas. 4893, it was expressly held that the reasonable and necessary expense of wharfage of a vessel while in custody of the marshal may properly be taxed in his bill of costs and expenses. This case was cited with approval by the Circuit Court of Appeals for the Second Circuit in *The Neptune*, 252 Fed., 129, and the principal was there held to be applicable to the expense of raising a vessel which sank while in custody of the marshal.

#### **No Express Agreement by Marshal Necessary.**

But the respondent has contended that there is no maritime lien for the wharfage furnished by the petitioner while the *Poznan* was in the custody of the marshal, because the marshal made no express contract for the use

of the wharf, and because he disclaimed liability for payment therefor (R., 12, 13); and the Circuit Court of Appeals seems to have given weight to such disclaimer (R., 158). If an acknowledgment by the marshal of liability to pay the wharfage were necessary to make such wharfage a privileged debt against the vessel, such acknowledgment was made by him. While he disclaimed liability on January 7, 1921, he afterwards acknowledged liability by including such wharfage in his bill of expenses for the custody of the vessel and actually charged his commission of 2 per cent. thereon (R., 19), although he had not actually paid it. He did exactly what was done in the *St. Paul* case, and, indeed, what is the common practice in the Southern District of New York. This wharfage was thereafter disallowed by the Court as a part of the marshal's disbursements, but with distinct proviso that it was "without prejudice to any rights of the New York Dock Company to have recourse against the proceeds if any such right there be" (R., 25). In doing this the District Court undoubtedly had in mind the ruling of the Circuit Court of Appeals in the *St. Paul* case, that if the marshal had not actually paid the wharfage the proper remedy of the wharf owner was by libel *in rem* or petition against the proceeds.

However, no express contract or acknowledgment of liability by the marshal was necessary. He had no more right to keep the *Poznan* at the petitioner's wharf than any private owner of the vessel would have, and upon the use of the wharf by the vessel the law implied a promise by some one to pay. If the marshal had paid, he would have done so on behalf of the vessel and could therefore have charged the amount in his bill against her proceeds. Since he did not pay, the liability rests on the

vessel or her proceeds and on the respondent, the then libellant, at whose instance the vessel was held. The use of the wharf by the marshal to safely keep the vessel would undoubtedly render him personally liable notwithstanding his denial of liability, were it not for the fact that he was known to be only acting as the agent of disclosed principals. It is idle to argue that the petitioner must receive no compensation for the use of its property, because, as an indulgence to those responsible for the arrest of the vessel, it did not demand payment in advance. Had this respondent been dissatisfied with what the marshal did with the vessel the proper course was to apply to the Court for relief. This was not done; on the contrary the respondent opposed the removal of the vessel from the petitioner's wharf, when application was made to the Court for such removal.

The case of *The Novelty*, 9 Ben., 195; Fed. Cas., 10368, is strikingly in point. In that case the marshal arrested the vessel under process *in rem*, directing him to seize and safely keep her. At the time she was lying upon a marine railway, where she was duly arrested by the marshal. She was in bad condition and if removed without repairs would have sunk. In sustaining a libel *in rem* for the dockage, District Judge BENEDICT said:

"The marshal received no other instructions than that contained in his process, and there was nothing for him to do but to keep the vessel upon the dock where he found her, for he had no funds in his hands to expend in repairs nor any authority to make repairs, and he could not remove the boat from the dock without danger of her destruction. Under such circumstances I see no other way but for him to pay whatever is proved to be a reasonable and proper sum for the use of the dock while

*the boat was in his custody.* Section 829, Rev. St., has no relation to expenses of preserving a ship such as are here in question. Expenses like these may be allowed to be made when necessary, and *they are chargeable upon the property saved.*

"\* \* \* I am of the opinion, therefore, that if paid by the marshal it may be taxed by him as a necessary item of expense of preserving the vessel *while in his custody.*

"It is to be regretted that the parties interested in this boat permitted her to remain upon the dock until a bill for dockage equal to her value had been incurred, when timely application for her sale as perishable would have saved the greater part of the expense. *For this unfortunate result the parties who lose thereby are alone responsible, because although aware of the position of the boat they made no effort to save the expense.*" (Italics ours.)

In that case there was no order of the Court creating the lien and there seems to have been no express agreement by the marshal to pay dockage; but in the case at bar, although there was no express promise by the marshal to pay, there was an order of the Court permitting the wharf to be used. It may be noted further that in that case there was no overt act by the libellant approving the continuance of the vessel on the dock, while in the case at bar the respondent objected to the removal of the *Poznan* from the petitioner's wharf.

There is nothing very peculiar in this provision of the maritime law that the wharfage of a vessel in custody of the law shall be a lien on her and her proceeds. Under the law of the sea a vessel is a legal entity. "She acquires a personality of her own \* \* \*. She may also become a *quasi bankrupt*"; *Tucker v. Alexandroff*, 183 U. S., 424, 438. To depart from the language of the admiralty, when

taken into the custody of the law she and her proceeds are held in trust for the payment first of the expenses of administering the trust and then for the payment of her obligations.

"It is a general principle that a trust estate must bear the expenses of its administration."

*Trustees v. Greenough*, 105 U. S., 527, 532.

In *Meddaugh v. Wilson*, 151 U. S., 333, 342, referring to certain assignees in bankruptcy, this Court said:

"Their services in this respect not being to any party or parties but in respect to the property itself, and to secure its proper application among all parties interested, it is clearly in accordance with settled rules of equitable jurisprudence, as well as with the practice in bankruptcy proceedings, that compensation for their services, including the pay of their counsel, should be made a direct charge upon the property, and a charge prior in right to the claims of creditors or stockholders."

#### **The Custody of Receivers.**

In *The Resolute*, 168 U. S., 437, this Court held that the fact that seamen rendered services to a vessel while in the hands of a receiver was not absolutely inconsistent with a lien *in rem* for their wages, citing *Parson v. Cunningham*, 63 Fed., 132, where a vessel was libeled for a collision which occurred while she was in the hands of a receiver and the libel was upheld, even as against the receiver.

In *The Willamette Valley*, 66 Fed., 565, the Circuit Court of Appeals for the Ninth Circuit upheld a libel in California for repairs furnished there to a vessel in the

hands of a receiver appointed by an Oregon court. There seems to have been no doubt as to the lien, but only as to its enforcement. It is a general principle that one court will not interfere with property in the lawful custody of another court, but when such custody ceases, then other courts may deal with the property according to the rights of parties interested therein. *Moran v. Sturges*, 154 U. S., 256. So when services are rendered a vessel while operated by a receiver the only question is whether the maritime lien arising therefor shall be enforced before the receivership is ended or after. This question rarely arises, because, as this Court said in *The Resolute*, *supra*, "We cannot assume that the Court would authorize its receiver to run these vessels without making some provision for preferential payment of their current expenses." But on principle the existence of the maritime lien and the right to enforce it seem clear. A vessel as a legal entity never goes into the hands of a receiver. All the receiver gets is what the owner of the vessel had, a chattel with the right to devote it to purposes of maritime commerce. If he does so, it becomes a vessel and passes into the admiralty and maritime jurisdiction, and is entirely beyond the control of the receiver and the court appointing him, except insofar as a private owner might control her; that is, by directing her voyages and business or withdrawing her from maritime commerce. If a court of admiralty should refrain from exercising its jurisdiction over a vessel so operated, it would be entirely through comity.

**Respondent Estopped from Claiming Proceeds as  
Against Petitioner.**

There is a further reason why it was erroneous to refuse the petitioner preferential payment from the proceeds of the vessel. Assuming that the arrest of the vessel by the marshal terminated the contract made by her owner, her arrest and her subsequent use of the petitioner's wharf was at the instance and for the benefit of the respondent and the other libelants in the consolidated cause of *Joseph H. Davis* against *The Poznan*, since in that cause they recovered the vessel's cargo valued at nearly \$2,000,000, and caused the vessel to be sold to answer damages aggregating \$1,216,000 (R., 146). In these circumstances said respondent and these other libelants are liable to the petitioner for such use of its wharf; and they are therefore, estopped from claiming the proceeds of the vessel to the exclusion of the petitioner and it is so important and so eminently just that those who render services in aid of the administration of justice shall be compensated, that they not only have a lien on the property in the custody of the Court, but they may recover from the respondent at whose instance the service was rendered and may even hold the respondent's proctors personally liable, if there is no other way to obtain such compensation.

This question was presented in a rather peculiar way in the case of *The Georgeanna*, 31 Fed., 405, which arose in the Southern District of New York. There the libel was by seamen, who, under the rule, were permitted to sue without giving any security for costs. After the arrest of the vessel the claimants, pursuant to the rule of the Court, paid into the registry the amount claimed in the libel, with interest, and the costs of the officers already accrued, together with the further sum of \$250 to



cover costs, and thereupon received delivery of the vessel from the marshal. Upon the trial the libelants were adjudged to have no lien and the libel was dismissed. The claimants demanded the return of the whole money deposited, because they had been adjudged without fault. The marshal claimed his fees out of the deposit. As the deposit was in lieu of and as a substitute for the stipulation for value provided for in R. S. 941, he claimed that it was security for his costs and expenses in keeping the vessel under the mandate of the Court, and his claim was allowed by the Court.

“Whenever a stipulation is taken in an admiralty suit, for the property subjected to legal process and condemnation, the stipulation is deemed a mere substitute for the thing itself, and the stipulators liable to the exercise of all those authorities on the part of the Court, which it could properly exercise, if the thing itself were still in its custody.”

*The Palmyra*, 12 Wheat., 1, 10.

The theory of the decision in *The Georgeanna*, *supra*, is that the deposit under the rule of the Court was a mere substitute for the stipulation for value under R. S. 941, and was therefore a substitute for the vessel itself; and that since the marshal's fees, being an expense of justice, were a privileged claim against the vessel, it was a privileged claim or lien on the deposit. The decree was not against the deposit as a substitute for a stipulation for costs, because such a stipulation only secures such costs as are decreed against the stipulators, and there could be none in this instance, because the claimant was adjudged without fault. Most of marshal's claim in this instance was for keeping the vessel in his custody, that

is, for the dockage, and the Court attributed the accumulation of such fees to the claimant's laches in not sooner having her released.

The Court in its opinion in *The Georgeanna*, *supra*, cited R. S. 857, which provides that "the fees of officers, except those which are directed to be paid out of the treasury, shall be recovered in like manner as the fees of the officers of the States respectively for like services are recovered"; and then pointed out the analogy between the marshal having a vessel in custody and the sheriff holding attached property, on which, in the State of New York, the sheriff has a lien for his costs and expenses (New York Civil Practice Act., Secs. 970, 1101). The Court further justified its decision by quoting Judge HALL in *Re Mealy*, 2 N. B. R., 128, as follows:

"The general rule in regard to payment of the fees of officers of the Court undoubtedly is that such fees must be paid, in the first instance, by the parties or persons for whom the service is performed, subject, of course, in respect to the party upon whom the burden shall ultimately rest, to the decree or judgment of the Court upon the final disposition of the case."

In *The Georgeanna*, the Court went even further and pointed out that not only were the suitors liable for officers' costs and expenses incurred at their instance, but that in the State of New York it had been long settled that their attorneys and solicitors were likewise personally liable (*Adams v. Hopkins*, 5 Johns., 252; *Gadski-Tauscher v. Graff*, 44 Misc., 418; *Ruhloff v. Colts*, 174 N. Y. S. 159). The Court then added:

"The justice of the above provisions is evident from the fact that the marshal is, in effect, the

bailee of the property in his charge, for the benefit of all the parties to the cause. Acting under the mandate of the Court, he is responsible to each and all of the parties interested for the due delivery of the property as finally determined. \* \* \* The fact that the libelant, or his proctor, may be liable, as the employer of the marshal, does not conflict with this right to payment on delivery for charges in protecting the property."

So much for the use of a wharf as an expense of justice.

The second way in which a vessel may use a wharf, that is, as a necessary incident of her *operation* as an agency of commerce, will be discussed in the next Point.

## POINT II.

**The petitioner's claim for wharfage furnished after the arrest of the vessel is privileged under the General Maritime Law for the further reason that it was a necessary expense of her operation while in custody, incurred by consent of the respondent and by permission of the Court.**

In denying the petitioner preferential payment from the proceeds of the vessel, the learned Circuit Judge delivering the opinion of the Circuit Court of Appeals said (R., 166) :

"But we find nothing in the facts of this case \* \* \* which took the case out of the rule that where the ship is in *custodia legis* no lien arises for wharfage services."

In the preceding point it was shown that a lien for wharfage *does* arise against a vessel and her proceeds in

*custodia legis*, when furnished as a necessary incident to the prosecution of a suit and therefore as an expense of justice. The purpose of this point is to show that, in making the foregoing statement, the Circuit Court of Appeals overlooked material facts peculiar to this case, and that owing to such facts the petitioner is also entitled to a maritime lien for the wharfage furnished after the arrest of the vessel as a necessary incident to her operation.

After the arrest of the *Poznan* and while she was in custody of the marshal, by the consent of the respondent and by order of the Court she was permitted to function as a vessel and continue her operation and pursue her usual business by the discharge and delivery of her cargo at the petitioner's wharf. In the libel of A. M. Campen's Sons, Inc., one of the parties to the consolidated libel, to which the respondent was also a party, the Court ordered the delivery of the cargo to the claimants thereof by the charterer of the vessel (R., 14-17); and, upon the request of the cargo claimants, including the respondent in the case at bar, the Court denied the application of the charterer of the vessel for an order requiring the owner of the vessel to remove her from the petitioner's wharf to another wharf (R., 36). In obedience to said two orders the *Poznan* remained at the petitioner's wharf and there, through her charterer or owner delivered her cargo, although during the whole time she remained in the custody of the marshal and under the control of the Court.

#### **The Correct Rule as to Maritime Liens While Vessel is in Custodia Legis.**

It is incorrect to say that no maritime lien can arise against a vessel in custody of the law. A more correct statement of the rule is that there can be no such lien

unless the one claiming such lien has been permitted by those responsible for the arrest of the vessel or by the Court to render to the vessel a service for which a maritime lien would arise were she not in custody. No permission for the lien is necessary, but only for the service. Such permission may be quite general, as was the case in *The Young America*, 30 Fed., 789, 790, 791, where, after the vessel was arrested the libellant and the owner of the vessel directed the marshal not to tie her up or put a keeper on her, "and she was permitted to run about the harbor in her usual business," and obtained supplies for which she was libelled. In sustaining a maritime lien for such supplies the Court referred to the rule that liens could not arise against a vessel in custody, and said:

"So far as respects the parties to the cause, the benefits of the rule may be waived; and the rule cannot properly be applied at all where, by direction of the parties, the arrest is formal only, and is not designed to be followed by any actual possession of the marshal. . . ."

"The rule excluding subsequent liens cannot be extended to vessels that are not actually, as well as constructively, in the marshal's possession. Where a plaintiff, as in this case, obtains only a nominal arrest of a vessel, and virtually directs that she be left to pursue her ordinary business, with its attendant liabilities to other persons, in contract or *in tort*, he must be held to have waived the benefit of the custody of the court as a protection against other liens, and to be estopped from claiming, as against third persons, the exemptions that belong only to a vessel in actual custody."

Or the permission for the vessel to "pursue her ordinary business" may be limited and for a special pur-

pose, as was the case in *The St. Paul*, 271 Fed., 265, where, while the vessel was in custody, a wharf owner was permitted to take the vessel from her anchorage in the harbor to his wharf and was allowed a maritime lien for wharfage accruing while she remained there.

In order that a maritime lien may arise for a service rendered a vessel in custody, such service need not be incidental to her locomotion, or navigation, strictly speaking. In *The Nisseogue*, 280 Fed., 174, such liens were allowed for supplies furnished and for repairs made after the arrest and while she was in custody of the marshal tied up to a wharf, by consent of her owner and master and without objection by the marshal. In the same case a lien for wages of the crew of the vessel was denied, which was perfectly proper, for the reasons hereinafter stated.

### **Cases Distinguished.**

The Circuit Court of Appeals cites twelve court decisions and four text writers in support of the statement that when a "vessel is in *custodia legis* she is withdrawn from navigation and no lien arises for wharfage charges incurred during the period she is so withdrawn" (R., 154-157). However, it is respectfully submitted that not a single one of these supports the conclusion reached. In *Beard v. Marine Lighterage Corporation*, 296 Fed., 146, the question now under discussion was not before the Court, but the use there of the phrase "out of commission or withdrawn from navigation" was entirely proper if it is construed in the light of what is here said in regard to the other cases cited. The learned Court wholly misconceived what amounts to *withdrawal from navigation* within the meaning of these authorities. The word

"navigation" has become more or less current in the reports in this connection in a rather loose sense. Strictly speaking "navigation" expresses the idea of moving or maneuvering a ship. To express the idea now under consideration the courts sometimes use the term "navigation and commerce." The idea is more accurately expressed by the phrase "maritime activities," and such is the expression used by the Court in *The Andrew J. Smith*, 263 Fed., 1004. Having this distinction in mind, it will be seen that the cases cited by the Court as authority fall into three groups, to neither of which does the case at bar belong: (1) those where all maritime activity by the vessel had been terminated by act of the parties; (2) those where all maritime activity by the vessel had been terminated by operation of law; and (3) those where the maritime lien claimed was for seamen's wages.

(1) To the first group belong *The C. Vanderbilt*, 86 Fed., 785; *The Andrew J. Smith*, 263 Fed., 1004; *The Pulaski*, 33 Fed., 383; and *The Fortuna*, 206 Fed., 573. In each of these cases all maritime activities had ceased by act of the parties, and the ship had ceased to be a ship. In *The C. Vanderbilt*, navigation was closed and the vessel was tied up at a pier for the season; she was "out of commission"; she had "abandoned for the time the purpose of her construction." "Mariners are discharged, the boat is shut up, like a closed house, and left in idleness to a caretaker or watchman." And the Court emphasized such cessation of maritime activity as the reason for denying a maritime lien for wharfage by saying:

"Whatever is done to operate a ship, to aid her physically in the performance of her mission, viz.

to take freight or passengers, to carry freight or passengers, to *unload freight* or passengers, and to preserve her while so doing, is a maritime service." (Italics ours.)

In *The Andrew J. Smith*, the vessel was totally disabled and was laid up for repairs; repairs were abandoned and she sank at the pier where she was. The Court said:

"\* \* \* Wharfage cannot be treated as a basis for a maritime lien when it is equivalent to storage or dockage of a vessel completely, for the time being, withdrawn from navigation, *as if drawn out on the bank*, or on ways, to lie like a chattel in storage, entirely separate from its maritime activities." (Italics ours.)

In *The Pulaski*, navigation on the Great Lakes was closed for the season; the vessel was tied up at Detroit and received wheat "to be held and stored on board said schooner until the opening of navigation in the following spring unless sooner discharged by the shippers; and if not discharged" to be transported to Buffalo or elsewhere, different rates of compensation being charged for the storage and for the transportation. The Court said:

"If the storage were a mere incident of the transportation \* \* \* I should have no doubt that the vessel would be liable \* \* \*. But, in this case, the contract is primarily for storage, and the transportation is a mere contingency, possible or probable in the future."

In *The Fortuna*, the vessel was laid up, the master had been discharged, and a watchman was in charge.

(2) To the second group belong *The Estaban de Anun-ano*, 31 Fed., 920; *The Mary K. Campbell*, 31 Fed., 840.



In each of these cases the vessel had been levied upon under a State law and taken into possession by a sheriff, and by operation of law she passed out of the admiralty and maritime jurisdiction, ceased to be a ship—a legal entity with a “personality of her own” “competent to contract” and “individually liable for her obligations”—and went into the custody of the State law as a mere chattel. Obviously there could not be a maritime lien in such cases. *Taylor v. Carryl*, 20 How., 583. It has been held that the money paid for the aid to a vessel in her business, which she derives from the use of a wharf “is not rent, but wharfage.” *The Kate Tremaine*, 5 Ben., 60; Fed. Cas., 7622. It is equally true that what a sheriff pays for keeping a vessel in his custody is not wharfage, but rent or storage.

(3) To the third group belong *The Augustine Kobe*, 37 Fed., 696; *The Erinach*, 7 Fed., 231; *The Philomena*, 200 Fed., 873; *The Astoria*, 281 Fed., 618, and *The Nisseogue*, 280 Fed., 174. In each of these cases the arrest was by the marshal and the custody was that of the maritime law. Though in custody the ship was still a ship, a legal entity “with a personality of her own,” and in no other capacity did the court of admiralty and the maritime law know her. But in each case a maritime lien for seamen’s wages after the arrest was denied, for the reason that the voyage was terminated. It was not because the ship had ceased to be a ship, but was on account of the peculiarity of the seaman’s contract and character of his duties. The seaman is employed for the voyage and if the voyage is terminated he is discharged and two months’ additional pay is allowed him by statute. As was said by the Court in *The C. Vanderbilt*, *supra*, “the mariner

is an operative"; he operates the ship on her voyage, and when the voyage is at an end his occupation is gone. In each of these cases the maritime lien was denied from the date of the seaman's discharge or the date the voyage was abandoned or terminated; that is, from the time the seamen ceased to be a seaman. It is axiomatic that if there is no sailing there can be no sailor's wages. This is strikingly illustrated in the case of *The Nisseogue*, *supra*, where the voyage was abandoned, but not until after the vessel had been for some time in the custody of the marshal. In that case the lien for the wages of the crew was allowed up to the date of the abandonment of the voyage but denied after that date, but the lien for repairs even after that date was allowed because they were necessary for the vessel in her then condition, and were not objected to by the marshal. Though not then on a voyage she was still a vessel and liable as such for a service rendered her if necessary and permitted by her custodian.

None of these cases is even remotely analogous to the case at bar. The petitioner's demand is for wharfage, a service never necessary or even possible when the vessel is being navigated, in the strict meaning of that word, but a necessity when the vessel is engaged in two of her most important functions, viz., receiving her cargo and discharging her cargo. The *Poznan* used the petitioner's wharf to discharge her cargo, worth approximately \$2,000,000 (R., 135) and thereby to earn such freight money as might be due her (R., 16). And this was done by order of the Court and consent of the respondent, which received its share of said cargo, and which has therefore waived any protection that custody of the law might afford and is estopped from now claiming such protection.

It is respectfully submitted that there is no similarity between the facts in this case and the facts in the case of *The Advance*, 60 Fed., 766, affirmed 71 Fed., 987, as suggested by the Court below (R., 158). In that case the owner of *The Advance*, a corporation, had contracted for the "entire use" of the pier "for any and all purposes" by the corporation itself and any and all of its fleet of several vessels and by its patrons. It was for wharfage at this pier that *The Advance* was libelled by the owner of the pier. It was impossible to separate her wharfage from other things for which she could not be liable. Her owner's contract was undoubtedly a lease of the pier and the wharfage was therefore furnished by her owner as lessee of the pier and not by the libellant as owner of the pier. The owner of the pier was properly denied a maritime lien on the vessel on the principle which this Court applied in *Piedmont Coal Co. v. Seaboard Fisheries Co.*, 254 U. S., 1.

#### **Petitioner's Contract Expressly for Wharfage.**

In the instant case the contract for the wharfage services is thus set forth in the agreed statement of facts (R., 8):

"On or about November 30, 1920, New York Dock Company and Polish-American Navigation Corporation by C. J. Nevelson, Treasurer, entered into an agreement for the use of said Pier No. 6 by the *S. S. Poznan* to discharge, Polish-American Navigation Corporation agreeing to pay therefor \$250.00 per day, charge to commence from 7:00 A. M., December 1, 1920, and to continue up to the time the steamer left and/or all cargo was removed, and agreeing to pay in addition thereto

for lights at the rate of \$1.00 per light, per night or part thereof, for cleaning pier cost plus ten per cent., and for carting dirt \$2.50 per one horse load and \$1.30 for dump ticket when required, and \$5.00 per two horse load and \$2.15 for dump ticket when required."

It will thus be seen that the contract was made *exclusively for the benefit of the vessel*. The agreement was "*for the use of Pier No. 6 by the said S. S. Poznan to discharge*." No other vessel could use it, nor could the owner of the vessel use it personally for any purpose whatever. It was not, and indeed could not, be found that the contract was a lease of the pier to the owner of the vessel personally. The contract shows that the owner of the pier, the petitioner herein, was to furnish the lights and do the cleaning incident to the use of the pier, and presumably the petitioner, as owner of the pier, was charged with the duty of rendering to the vessel any other service necessarily incident to its use of the pier.

The contract was for the wharfage of the vessel by the petitioner, as wharfage has heretofore been defined by the Circuit Court for the Second Circuit and understood in the Port of New York.

"'Wharfage' is money paid for landing goods upon or loading them from a wharf. \* \* \*

"It is too well known to need citation or reference to papers that, when a steamship engages a berth, wharfage by that name is due and payable, not only while she lies alongside, but while the discharging space is occupied by her cargo. This is the immemorial custom of this port." (The Port of New York.)

*Old Dominion S. S. Co. v. City of New York, et al.*, 286 Fed., 155, affirmed 286 Fed., 157 (C. C. A., 2).

To the same effect are the following cases:

*The Allan Wilde*, 264 Fed., 291;

*The Rathlin Head*, 292 Fed., 867.

"Wharfage is strictly a maritime lien. It might be preferred against the boat without reference to the relation of the libellant to the owners of the boat. It is a lien good in the hands of whoever holds it, for the amount justly due, and could be enforced against the vessel itself, without reference to the ownership thereof. \* \* \* A lien for wharfage is made, under the general maritime law, a lien next in rank to wages."

*The Shrewsbury*, 69 Fed., 1017, 1020.

"The money paid for the aid to the vessel in her business, which she derives from the use of the wharf, is not rent, but wharfage."

*The Kate Tremaine*, 5 Ben., 60, Fed. Cas. 7622.

Indeed *wharfage* is a kind of service incapable of rendition to a natural person, or any legal entity except a vessel.

No services were included except such as are necessarily incident to wharfage, that is, lights and the removal of dirt on the pier caused by discharging the cargo. If in this case payment is claimed for any service for which the vessel is not liable, it is easily separable from the amount due for wharfage, for which the vessel is liable. The inclusion in a claim against a vessel of items for which she is not liable does not defeat items for which she is liable. In *The St. Jago de Cuba*, 9 Wheat., 409, the claim was for repairs, but included an item for wharfage. The Court denied a lien for the repairs but allowed a lien for the wharfage.

**Respondent Has Adopted Rule of Law Contended for  
by Petitioner.**

If anything further is needed to show that a maritime lien may arise or accrue against a vessel which is in *custodia legis* it will be found in the rule of law applied in the respondent's own libel against this very same vessel, reported as *The Poznan*, 276 Fed., 418, 435 (R., 123). In that case the respondent claimed and recovered damages for breach of a contract of affreightment and for negligence in the discharge of the cargo and the Court held such recovery to be a maritime lien on the vessel. An element of the damages for the difference between the value of the shipment at the date and place it should have been delivered and the value at date it was delivered in New York, which latter date was after the vessel had been arrested. Therefore a part of said damage and the maritime lien therefor accrued while the vessel was in the custody of the law. And that part of the maritime lien which was for negligence in discharging the cargo arose in the first instance after the arrest and while the vessel was in *custodia legis*, since the discharge did not begin until after the arrest and covered a long period. So that the respondent's maritime lien against this vessel both arose and accrued, in part, at the very time the petitioner furnished the wharfage for which a maritime lien has been denied. It is peculiarly inappropriate and unjust that one rule of law should thus be applied to this part of the respondent's claim and a different rule applied to a similar claim of the petitioner in the distribution of the proceeds of this same vessel.

From the foregoing it clearly appears that the facts peculiar to this case make the defense of the custody of

the law wholly insufficient and that the learned Circuit Court of Appeals erred in sustaining such defense.

As most of the petitioner's claim is for wharfage furnished *after* the arrest of the vessel, this and the preceding point, for all practical purposes, should be decisive of this case in the petitioner's favor. However, the learned Circuit Court of Appeals denied the petitioner a lien even for that part of the wharfage which accrued *before* the arrest, and in doing so fell into further error of such far reaching effect, that it is discussed in the next point.

### POINT III.

**Under the General Maritime Law the petitioner's claim for wharfage is a privileged debt against the vessel and her proceeds notwithstanding—(1) the wharfage was furnished under a contract with her owner instead of her master; (2) there was no agreement by the parties that a lien should arise, and (3) there is no proof of credit to the vessel.**

The learned Circuit Judge, delivering the opinion of the Circuit Court of Appeals said (R., 158, 159):

"As Chief Justice Marshall said in *The United States v. The Schooner Little Charles*, 1 Brock. 347, 354, 'The vessel speaks and acts by the master.' In this case the wharfage contract was not made with the master of the vessel but with the owner \* \* \*.

"A maritime lien arose only where credit was given to the vessel, not where it was given to the owner or charterers. If the agreement was made with the owner, unless there was an *express agreement for a lien* or the circumstances indicated that the services were rendered or the supplies furnished

with the *understanding that the ship would be responsible*, no lien arose \* \* \*. In this case the credit was not given to the ship, and the contract was not made with the master of the ship but by the ship's owner." (Italics ours.)

And again (R., 165, 166) :

"But in the instant case it does not appear from the agreement made between the Dock Company, as owner of the wharf, and the Polish-American Company, as the owner of the ship, that any *intention existed to make the ship a security for the wharfage and other expenses which were incurred.*"

"But we find nothing in the facts of this case which indicated that any *intention existed to make the ship a security for the charges incurred.*" (Italics ours.)

This statement of the law is erroneous because (1) it draws a sharp distinction between the liability of a vessel for wharfage when the contract therefor is made by her owner and when it is made by her master; (2) it makes a maritime lien for wharfage depend upon the agreement of the parties that it shall arise, if the contract for such wharfage is made by the owner of the vessel, and (3) it makes the maritime lien for wharfage depend on questions of credit.

#### Vessel Bound by Contract of Either Her Owner or Her Master.

1. In the case of *The Little Charles*, *supra*, cited by the Court which was a case of forfeiture for not reporting the vessel, the Chief Justice makes it clear why "the



vessel speaks and acts by the master." He says that it is because :

"The master is selected by the owner, as his agent, for the purpose, among others, of reporting the vessel on her coming into port."

The authority of the agent cannot be greater than that of his principal. A contract for wharfage is the vessel's contract and she is primarily liable. It is immaterial whether her owner or her master speaks for her in making such contract.

In *Ex parte Easton*, 95 U. S., 68, 73, 77, this Court said :

"Compensation for wharfage may be claimed upon an express or an implied contract, according to the circumstances, where a price is agreed upon for the use of the wharf, the contract furnishes the measure of compensation; and when the wharf is used without any such agreement, the contract is implied, and the proprietor is entitled to recover what is just and reasonable for the use of his property and the benefit conferred."

"Viewed in the light of these considerations, it is clear that a contract for the use of a wharf by the *master or owner* of a ship or vessel is a maritime contract, and, as such, that it is cognizable in the admiralty; that such a contract, being one made exclusively for the benefit of the ship or vessel, a maritime lien in the case supposed arises in favor of the proprietor of the wharf against the vessel for payment of reasonable and customary charges in that behalf for the use of the wharf, and that the same may be enforced by a proceeding *in rem* against the vessel, or by a suit *in personam* against the owner." (Italics ours.)

In instant cause it is immaterial whether the recovery is at the contract price or the reasonable value, because they have been found to be the same (R., 132-135).

### Maritime Lien Never Created by Agreement.

2. A maritime lien arises by operation of the maritime law and is in no way dependent on the agreement or understanding of the parties for its creation. It is a necessary incident of the rendition of the service, and it is wholly unnecessary to stipulate that the credit shall be given on account of the vessel. *The Emily Souder*, 17 Wall., 666; *The J. E. Rumbell*, 148 U. S., 1.

Indeed in *The Saratoga*, 204 Fed., 952, the Circuit Court of Appeals for the Second Circuit expressly held that the owner of a vessel could not create a maritime lien. Such an agreement would be in the nature of a pledge or mortgage, and it is well settled that a mortgage is not and cannot be a maritime lien, and under the General Maritime Law is always subject to such liens. *The Rupert City*, 213 Fed., 263, 266; *The J. E. Rumbell*, 148 U. S., 1; *Schuchardt v. Babbidge*, 19 How., 239. Hence the ship mortgage of June 5, 1920, chapter 250, sec. 30, was necessary to give certain mortgages of a vessel a "preferred" status with respect to certain maritime liens.

In *Carroll v. Bancker*, 43 La. Ann., 1078, the Court said:

"Privilege and pledge are totally different things, for the Code says:

"*Privilege* is a right the nature of the debt gives a creditor, and enables him to be preferred before other creditors, even those who have mortgages' (R. C. C. 3188); but 'a pledge is a contract by which a debtor gives something to his creditor as a security for his debt' (R. C. C. 3133).

### The Vessel a Capable Legal Entity.

Under the maritime law a vessel is a legal entity, a maritime corporation, so to speak. A contract for wharfage is her contract. Being her contract, she and her proceeds, that is, the assets of the maritime corporation, are liable for her debts in preference to claims of her owner or her owner's creditors; and this is all a maritime lien is. The rule is thus stated in 38 *Corpus Juris*, 1198:

"Under the American rule as finally established the vessel is itself looked on as a responsible being; and a maritime lien attaches directly, independent of questions of ownership or agency, the liability of the ship as such being the main thing, and the question of ownership being incidental."

The rule as thus stated is supported by the following decisions of this Court: *Tucker v. Alexandroff*, 183 U. S., 424; *The Barnstable*, 181 U. S., 464; *The John G. Stevens*, 170 U. S., 113; *The China*, 7 Wall., 53; *The Homer Ramsdell Transportation Co. v. La Comp. Gen. Transatlantique*, 182 U. S., 406. In this respect there is no distinction between claims arising in contract and those arising *in tort*. *The John G. Stevens*, *supra*, page 117.

"In this Court the ship has been personified so far as to incur liability in cases where the owner could not be held. *The China*, 7 Wall., 53. See *The Malek Adhel*, 2 How., 210, 234; *Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn Eastern District Terminal*, 251 U. S., 48, 53."

*In re East River Co.*, 266 U. S., 355, 367.

The analogy between a vessel as known to the maritime law and a corporation is striking, and has been several times referred to by this Court. It is discussed at

length and with great learning by Judge WARE in *The Rebecca*, 1 Ware, 187; Fed. Cas. 11619. Mr. Justice BRADLEY, delivering the opinion of this Court in *Norwich Co. v. Wright*, 13 Wall., 104, a leading case on limitation of liability, pointed out such analogy and cited the opinion of Judge WARE in *The Rebecca*, as leaving "little to be desired on the subject." It was again referred to by this Court in *The Scotland*, 105 U. S., 24, 30.

The legal entity of a land enterprise with limitation of personal liability is usually indicated by the word "Incorporated," "Limited" or "Societe Anonyme," or its abbreviation. But in case of a maritime venture, that is, a vessel on a voyage, this is unnecessary, because by the law of the sea all vessels in operation are legal entities with limitation of the personal liability of their respective owners. And each voyage is a separate venture. Since a voyage continues from the time a vessel leaves her home port to the time she returns, this explains why under the general maritime law as declared by this Court in *The General Smith*, 4 Wheat., 438, and later cases, there is no lien or privilege for "repairs, supplies and other necessities" furnished a vessel in her home port, notwithstanding the strong assaults on the doctrine, which have culminated in the Merchant Marine Act of 1920. These are the things which go to outfit a vessel, and, if furnished in her home port, are in the nature of the owner's capital investment, as the vessel itself is. If furnished in a foreign port, they are incident to her operation during a voyage, and are chargeable to the venture.

**Proof of Credit to Vessel Never Necessary in  
Claiming Wharfage.**

3. The rule of proof of credit to the vessel to give rise to a maritime lien never applied to claims for wharfage, but has always been restricted to claims of "materialmen" for "repairs, supplies and other necessities."

"Those are commonly called materialmen, whose trade is to build, repair, or equip ships, or to furnish them with tackle and provision (necessary in any kind)."

*The Neptune*, 3 Hagg., 129, 142.

This rule as to proof of credit was abolished even as to the claims of materialmen by the Maritime Liens Act of June 23, 1910, and the Merchant Marine Act of June 5, 1920, amending same. It was never applicable in claims for wharfage, towage, pilotage, salvage and seamen's wages, which are services necessarily rendered directly to the vessel as incidents of her *navigation or operation*, as distinguished from her *outfitting*.

This distinction was recognized by this Court as early as the case of *The St. Jago de Cuba*, 9 Wheat., 409, in which there was a claim for repairs which was denied as a lien against the vessel, and also a claim for wharfage which was allowed as a lien, this Court saying:

"There is, however, one item in this account, to the amount of 300 or 400 dollars, which is certainly good against all the world. This was for wharfage  
". . . ."

The case of *The St. Jago de Cuba*, *supra*, is cited along with other cases, by District Judge BENEDICT, in *The Kate Tremaine*, 5 Ben., 60; Fed. Cas. 7622, in which he said:

"Thus far, this doctrine has been applied by the Supreme Court only to the contracts of materialmen. The present is not the case of a materialman, but of a wharfinger. A wharfinger is not a materialman. His demand is of a different character, and is given a different rank in the order of payment. This has been several times adjudged."

This distinction is thus stated by Judge ROBERT M. HUGHES in 26 *Cyclopedia of Law*, 766:

"As to all maritime liens except those of materialmen, the rendition of the service to the vessel or the bringing her into such relations with any one as creates a maritime cause of action against her impresses upon her a maritime lien irrespective of questions of credit or ownership."

Since a maritime lien can not be created by agreement or understanding of the parties, but arises solely by operation of law, it necessarily follows that the only way any agreement or understanding of the parties can defeat such lien is by way of waiver or estoppel. There is nothing in the facts of the case at bar to show either. Certainly the mere fact that the contract was made by the owner instead of the master does not amount to either (*Ex parte Easton, supra*). There is no suggestion of fraud or laches or any conduct on the part of the petitioner which could operate as an estoppel. Nor is there any suggestion of a waiver. On the contrary, it clearly appears that the petitioner consistently and persistently insisted on its lien upon the vessel (R., 11, 12, 17). Merely charging the wharfage to the owner of the vessel or accepting part payment from her owner either in cash or a note is not a waiver. *The Emily Souder*, 17 Wall., 666; *The Bird of Paradise*, 5 Wall., 545; *The Kimball*, 3 Wall.,

37; *The St. Lawrence*, 1 Black, 522. The burden is on the party asserting it to show an intention to waive the lien. *The Guy*, 1 Ben., 112; affirmed in 9 Wall., 758.

But, if proof of credit to the vessel was ever required to give rise to a maritime lien for wharfage, it is no longer necessary by virtue of the provisions of the Merchant Marine Act of June 5, 1920, as is shown in the next Point.

#### POINT IV.

**Under the Merchant Marine Act of June 5, 1920, the petitioner is entitled to a maritime lien on the vessel for the wharfage services rendered her.**

The Court below denied the petitioner a lien under the general maritime law because it did not appear that the wharfage was furnished on the credit of the vessel. This was in effect a decision that wharfage is not a necessary within the meaning of the Merchant Marine Act of 1920. It is true the Court below (R., 161) declined to express an opinion on this point, because it was considered immaterial as to wharfage accruing while the vessel was in *custodia legis*, which the opinion says was "practically" the entire period for which the bill was rendered. But *some* wharfage *did* accrue prior to the arrest of the vessel. Therefore, as to the part of the wharfage accruing prior to the arrest, the Court below in effect held that the Act of 1920 afforded no protection. And if the petitioner is correct in the contention that a valid lien having once attached is not terminated by the mere arrest, then said decision affects the whole amount claimed.

While proof of credit to the vessel was never necessary to support a maritime lien for wharfage as was shown in the last Point, any doubt which might have existed is

removed by the Merchant Marine Act of June 5, 1920, which is merely declaration of the maritime law in this respect, but unfortunately doubt still exists.

In the Eastern District of New York it was held that the Act is *not applicable* to wharfage. *The Suelco*, 286 Fed., 286. In the District of Maryland it was held that the Act is applicable to wharfage. *The West Haven*, 297 Fed., 534. In the District of Massachusetts and the District of Maryland the Act has been held applicable to stevedoring. *United States v. Certain Subfreights of S. S. Neponset*, 300 Fed., 981; *Gray's Harbor Stevedoring Co. v. United States*, 298 Fed., 159. But the opinion of the Circuit Court of Appeals for the Second Circuit in *The Muskegon*, 275 Fed., 348, seems to indicate that the Act is *not applicable* to stevedoring. In the District of Massachusetts the Act has been held *applicable* to the use of a canal, *In re Burton S. S. Co.*, 3 Fed. (2nd), 1015; and also to services rendered in fumigating baggage as a legal requirement for the landing of passengers. *The Susquehanna*, 3 Fed. (2nd), 1014.

However, the Act has not been construed by this Court in this respect. The question involved is one of general importance, is of constant recurrence, and should be settled by this Court to end the conflict and confusion in the lower courts as to the proper interpretation of the Act. The weight of judicial opinion seems to be that the Act is applicable to wharfage and similar services, and therefore that it is not necessary to allege or prove that credit was given the vessel when the service was rendered on the order of the owner.

The Act of 1920 provides:

"Subsection P. Any person furnishing *repairs, supplies, towage, use of dry dock or marine railway,*



*or other necessities*, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel." (*Italics ours.*)

Act of June 5, 1920, C. 250, Sec. 30, Subsec. P.

The Maritime Liens Act of June 23, 1910, contained a similar provision, but the language was "*repairs, supplies, or other necessities, including the use of dry dock or marine railway.*"

"Any person furnishing repairs, supplies, or other necessities, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel."

Act of June 23, 1910, Ch., 373, 36 Stat. L. 604.

In *Piedmont Coal Co. v. Seaboard Fisheries Co.*, 254 U. S., 1, this Court made clear the purpose of the Act of 1910, which was to do away with the necessity of alleging and proving credit to the vessel when these things were furnished her in her home port or were ordered by her owner. The phrase "repairs, supplies and other necessities" had acquired a definite technical meaning, and it was held that it did not include wharfage, but was restricted to those things furnished by materialmen, that is, to those things used in *outfitting* a vessel, and did not include those things necessarily incident to the *navigation or operation* of the vessel.

The change in the language in the Act of 1920 is significant. By the inclusion of the word "towage" and placing the phrase "and other necessities" at the end of the series, the meaning of such phrase was enlarged, and under the doctrine of *ejusdem generis* now includes wharfage, which, of course, is a necessity, and akin to towage and use of marine railway and drydock. As was said by this Court in *Ex parte Easton*, 95 U. S., 68, 75, wharves are well-nigh as necessary as ships. And in *The George W. Elder*, 159 Fed., 1005, a lien for "drydockage" was allowed under a "wharfage" statute.

Wharfage is "most analogous to towage, pilotage, or salvage."

*The Allianca*, 56 Fed., 609, 613.

Stevedoring is most analogous to seamen's services, since "formerly the work was done by the ship's crew."

*Atlantic Transport Co. v. Imbrovek*, 234 U. S., 52, 62.

The phrase "other necessities" as used in the Act of 1920 has lost its former technical meaning, and now includes things which are of the same general character of any of the items enumerated. It now includes not only those things necessary for the *outfitting* of a vessel, that is supplies, repairs and other necessities of that class, but also those services necessarily incident to the *navigation* or *operation* of the vessel, such as towage, wharfage, pilotage, salvage, stevedoring and seamen's wages.

No good reason has been assigned for requiring a different rule of proof for wharfage, pilotage and the like from that required for towage and use of marine railway and dry dock.

Therefore by virtue of the Act of 1920 it was not necessary to allege or prove that credit was given the vessel, and the Circuit Court of Appeals erred in not allowing the petitioner a maritime lien under that act.

#### POINT V.

**Both under the General Maritime Law and under the Merchant Marine Act of June 5, 1920, the petitioner's lien for wharfage arose against the vessel before she was arrested and such lien was not terminated by operation of law upon her arrest.**

The petitioner's lien, which attached before the arrest of the vessel, was not terminated by act of the parties or order of the Court upon her arrest. This will not be denied. Neither was such lien terminated by the arrest as a matter of law.

The contract was for wharfage at a fixed rate, so long as the wharf was used for berthing the vessel and the discharge and delivery of her cargo. This was the vessel's contract and a maritime lien arose by operation of law the moment the vessel was made fast to the pier. Such lien survived the arrest of the vessel and continued so long as she was permitted to continue to receive the wharfage service. Particularly is this true in this case, because such permission was by order by the Court, and by consent and for the benefit of the respondent. The lien and the service are inseparable; the one cannot be destroyed while the other continues.

In the case of *The Bold Buccleugh*, 7 Moore P. C., 267, quoted and followed by this Court in *The John F. Stevens*, 170 U. S., 113, referring to a maritime lien, the Court said:

"This claim or privilege travels with the thing, into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached."

And this is true whether the lien arises *in tort* or contract. In *The John G. Stevens*, *supra* (p. 117), this Court held that "a maritime lien or privilege" constitutes "a present right of property in the ship, *jus in re*"; and further

"\* \* \* that a maritime lien is created as soon as the claim comes into being, has long been held to be equally applicable to all claims, which can be enforced in admiralty against the ship, whether arising out of tort or of contract. *General Ins. Co. v. Sherwood*, 14 How., 351, 363; *The Creole*, 2 Wall. Jr., 485, 518; *The Mayurka*, 2 Curtis, 72, 77; *The Young Mechanic*, 2 Curtis, 404; *The Kiersage*, 2 Curtis, 421; *The Yankee Blade*, 19 How., 82, 89; *The Rock Island Bridge*, 6 Wall., 213, 215; *The China*, 7 Wall., 53, 68; *The Siren*, 7 Wall., 152, 155; *The Lottawanna*, 21 Wall., 558, 579; *The J. E. Rumbell*, 148 U. S., 1, 10, 11, 20; *The Glide*, 167 U. S., 606."

The respondent's contract of affreightment was not terminated by the arrest of the vessel and the damages for breach thereof continued to accrue as a lien against the vessel while she was in custody (see p. 39); and neither was the petitioner's contract and lien for wharfage terminated.

The marshal is a custodian merely. His office is to preserve and not to destroy rights.

"When a vessel is arrested in admiralty, under the process of the court, the law requires that she

be kept safely by the marshal for the benefit of the parties to the cause, *and of all others interested in her.*" (Italics ours.)

*The Young America*, 30 Fed., 789.

The Court below decided that no maritime lien could arise, that is, originate, while the vessel was in *custodia legis*. Assuming that this is true when the vessel is withdrawn from maritime commerce, either by act of her owner or by the Court having her in custody, it by no means follows that a maritime lien, which has once attached and which is a privilege given by the maritime law to a creditor as an incident of the contract of service, is terminated by her arrest, particularly when, at the request or by the consent of those responsible for the arrest, the Court permits the vessel to continue to receive the service contracted for.

#### POINT VI.

**The question of an "equitable lien" not an issue in this case.**

The last four pages of the opinion of the Circuit Court of Appeals, beginning at the middle of page 162 of the Record, are devoted to a discussion of the subject of equitable liens, referring to the rights administered by courts of chancery under that name, and it was concluded that the petitioner was entitled to no such lien. The correctness of this conclusion is conceded. But the question was never an issue in this case. The petitioner never claimed an equitable lien or any other kind of a lien *eo nomine*. The libel alleges the rendition of the wharfage service, and the prayer is simply that the vessel be condemned and sold and that the amount due for such

service be paid out of the proceeds according to the course and practice of the Court.

The question of an "equitable lien" grew out of the opinion of the District Court, dated March 23, 1923 (R., 37), in granting the interlocutory decree (R., 41). In that opinion the learned District, now Circuit, Judge, delivering the opinion of the Court, said this petitioner had an "equitable claim" on the proceeds of the vessel (R., 38). The proctors for the respondent insisted that this meant an "equitable lien" as that phrase is commonly used. That such was not the meaning of the District Court is clear from its supplemental opinion, dated July 13, 1923 (R., 40), in which it said "of course it is true that an equitable lien against a ship will take no precedence over a maritime lien"; but it is added:

"The lien here established was an equitable lien against the lienors' own rights in the vessel arising after she was in custody. It was a lien on their liens, justiciable in this court only because the Court had custody of the vessel under the arrest. That was the holding in *The St. Paul*, 271 Fed. R., 265."

This was merely calling the petitioner's right, its *jus in re*, by the wrong name. At most it could only amount to giving the wrong reason for a righteous decree. However, the petitioner made timely request that it be not prejudiced even by such misnomer (R., 43). It was a mere shadow until the learned Circuit Court of Appeals gave it substance by giving the absence of an equitable lien as one of the reasons for denying the petitioner the privilege of participating in the distribution of the proceeds of the vessel for the satisfaction of its claim for wharfage.

What the District Court really decided was that the petitioner had the right to preferential payment from the proceeds on *equitable principles*, and this was entirely proper. It was unnecessary to give this right a name. The error now complained of is that the decree of reversal denies the petitioner relief because it has no "equitable lien," and not because, on *equitable principles*, it is not entitled to relief. The authorities cited in the opinion of the Circuit Court of Appeals are ample to show that while courts of admiralty are not courts of equity they are equitable courts and administer relief on equitable principles.

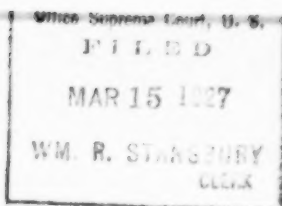
### CONCLUSION.

The decree of the Circuit Court of Appeals should be reversed and its order for a mandate and the proceedings thereunder vacated.

Dated, New York City, January 29, 1927.

Respectfully submitted,

JOSEPH S. AUERBACH,  
CHARLES E. HOTCHKISS,  
CHARLES H. TUTTLE,  
ALEXANDER J. FEILD,  
Counsel for the Petitioner.



# Supreme Court of the United States

OCTOBER TERM, 1926

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No. 229

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NEW YORK DOCK COMPANY

*Petitioner*

*against*

Steamship "POZNAN," her engines, etc., and  
JOHN B. HARRIS COMPANY

*Respondent*

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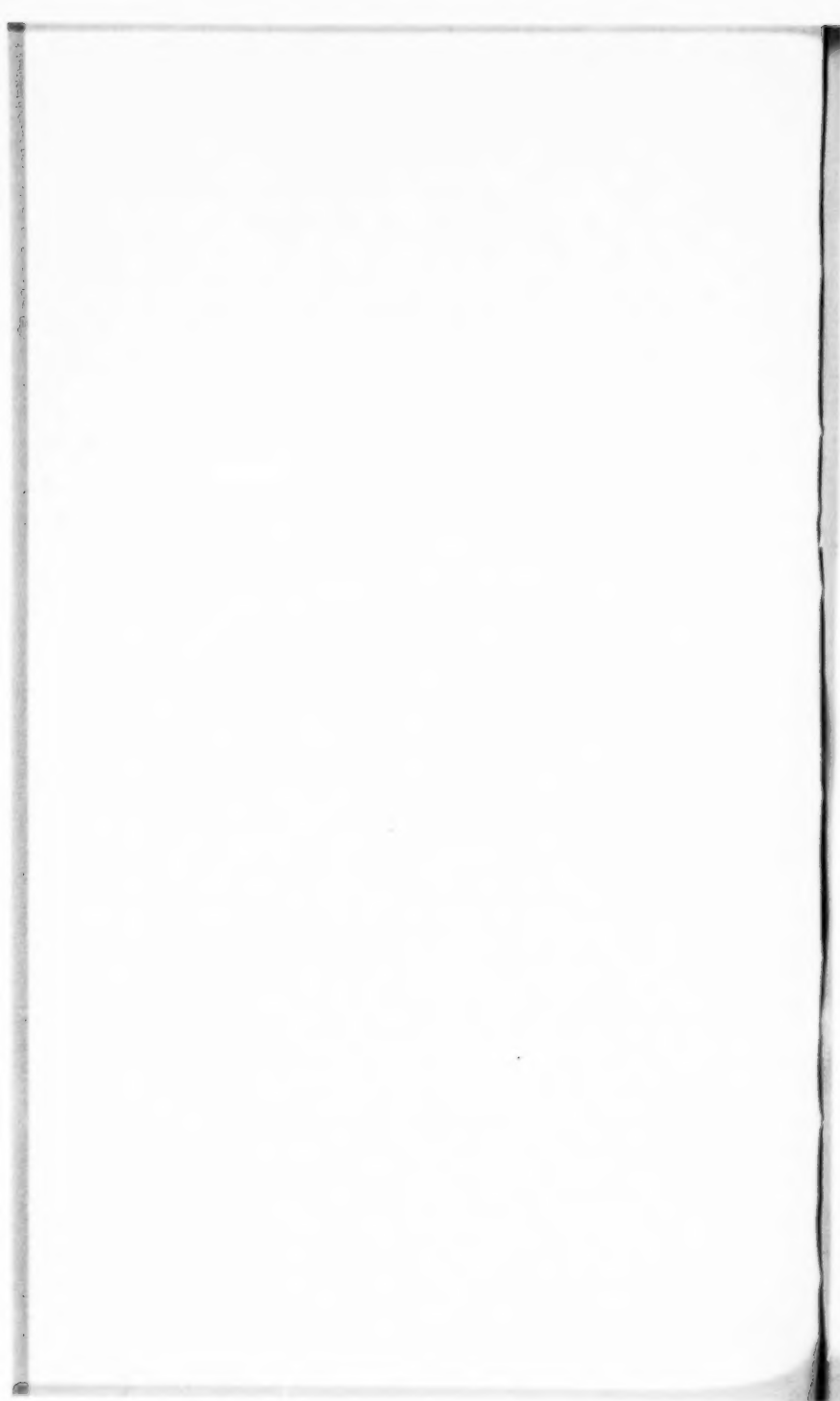
ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

---

JOSEPH S. AUERBACH  
CHARLES E. HOTCHKISS  
CHARLES H. TUTTLE  
ALEXANDER J. FEILD  
*Counsel for Petitioner*





## SUBJECT INDEX

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### PART I

|  | PAGE |
|--|------|
| POINT I.—In this cause the respondent represents all of the libellants in the so-called consolidated cause and may not now for the first time make its defense individual and separate ..... | 2    |
| POINT II.—The amount of the petitioner's recovery in the District Court should be accepted by this Court .....   | 4    |
| POINT III.—The discussion of the <i>St. Paul</i> case in respondent's brief is misleading .....  | 5    |
| POINT IV.—The New York State Wharfage Statute is not now available to the respondent as a defense or as evidence of the value of the use of petitioner's property .....                      | 6    |

### PART II

|   |   |
|---|---|
| Sections 859 and 863 of the Greater New York Charter have no application to the petitioner's pier No. 6 in any event, because these sections and their every predecessor since 1784 were enacted with sole reference to public wharves, meaning thereby wharves which the public has the right to use, and were never intended to apply to private wharves, meaning thereby wharves which are private property and which no one may use except by the permission of the owner,—such as admittedly is the wharf involved in this cause ..... | 9 |
|---|---|

|   | PAGE |
|---|------|
| POINT I.—Construed as an attempt to limit the right of recovery against a vessel under a maritime contract, Section 859 of the Greater New York Charter, is in conflict with Article III, Section 2 and Article I, Section 8, of the Constitution of the United States as an invasion of the admiralty and maritime jurisdiction, and therefore invalid ... | 9    |
| POINT II.—The statutes under consideration are applicable to public wharves only .....  | 18   |
| POINT III.—The libellants' wharves are not public but are private wharves .....   | 19   |
| POINT IV.—Section 859 of the Greater New York Charter is wholly inapplicable to wharfage at private wharves such as the libellants' wharves are .....   | 21   |
| 1. The Tenure of Waterfront Property on Manhattan .....   | 21   |
| 2. The Language of the Statute .....  | 25   |
| 3. Origin and Purpose of the Statute .....  | 27   |
| 4. Effects and Consequences of the Statute ....   | 29   |
| 5. The Practical Construction Placed on this and Kindred Statutes .....   | 29   |
| POINT V.—A wharf is public only when the public has the right to use it; use by license merely is not sufficient .....  | 34   |
| POINT VI.—Summary and Conclusion .....  | 37   |

## TABLE OF CASES

|   | PAGE          |
|---|---------------|
| <i>Allan Wilde, The</i> , 264 Fed. 291.....                                     | 18, 20, 31    |
| <i>Antonio Zambrana, The</i> , 88 Fed. 546 .....                                | 26            |
| <i>Belfast, The</i> , 7 Wall. 624, 640.....                                     | 17            |
| <i>Bogert v. Haight</i> , 20 Barb. 251.....                                     | 37            |
| <i>Brookman v. Hamili</i> , 43 N. Y. 554.....                                   | 14            |
| <i>Cannon v. New Orleans</i> , 20 Wall. 577.....                                | 14, 16        |
| <i>Chelentis v. Luckenbach S. S. Co.</i> , 247 U. S. 372.....                   | 10, 11        |
| <i>Commissioners of Pilots v. Clark</i> , 33 N. Y. 251 .....                    | 24            |
| <i>Coon v. Kennedy</i> , 248 U. S. 457.....                                     | 10            |
| <i>Downes v. Elmira Bridge Co.</i> , 41 App. Div. 339, 340..                    | 33            |
| <i>Dutton v. Strong</i> , 66 U. S. 23, 1 Black 23.....                          | 20, 35        |
| <i>Edwards v. Elliott</i> , 21 Wall. 532, 557.....                              | 14            |
| <i>Ex Parte Easton</i> , 95 U. S. 68, 73 .....                                  | 7, 12, 13, 30 |
| <i>Furman v. The City of New York</i> , 5 Sandf. 16.....                        | 22            |
| <i>Grant Smith-Porter Ship Co. v. Rohde</i> , 257 U. S. 469..                   | 12, 13        |
| <i>Great Lakes Co. v. Kierejewski</i> , 261 U. S. 479.....                      | 11            |
| <i>Hecker v. New York Balance Dock Co.</i> , 24 Barb.<br>215 .....              | 22, 25        |
| <i>In re Garnett</i> , 141 U. S. 1, 12.....                                     | 17            |
| <i>International Hide Co. v. New York Dock Co.</i> , 93 App.<br>Div., 562 ..... | 31            |
| <i>J. E. Rumbell, The</i> , 148 U. S. 1 .....                                   | 12            |
| <i>Key City, The</i> , 14 Wall. 653 .....                                       | 11            |
| <i>Kingsland v. The Mayor, etc., of New York</i> , 110 N. Y.<br>569 .....       | 24            |
| <i>Knickerbocker Ice Co. v. Stewart</i> , 253 U. S. 149....                     | 11, 16        |
| <i>Langdon v. The Mayor, etc., of New York</i> , 93 N. Y. 129                   | 23            |
| <i>Lottawanna, The</i> , 21 Wall. 558 .....                                     | 10            |
| <i>Louisville, etc., R. R. Co. v. West Coast Co.</i> , 198 U. S.<br>483 .....   | 20, 35        |
| <i>M. L. C. No. 10, C. C. A. 2</i> , 699 .....                                  | 9             |

|  | PAGE       |
|--|------------|
| Millers' Indemnity Underwriters v. Boudreaux, decided Feb. 15, 1926 .....    | 12, 13     |
| Murphy v. Voorhis, 10 Daly 457 .....   | 18, 21, 34 |
| O'Neill v. Annett, 27 N. J. L. 290 .....                                     | 37         |
| Osaka Shosen Kaisha v. Lumber Co., 260 U. S. 490 .....                       | 11         |
| Ouachita Packet Co. v. Aiken, 121 U. S. 444 .....                            | 14         |
| Packet Co. v. Catlettsburg, 105 U. S. 559 .....                              | 14         |
| Packet Co. v. Keokuk, 95 U. S. 80 .....                                      | 14         |
| Packet Co. v. St. Louis, 100 U. S. 423 .....                                 | 14         |
| Pearsall v. Post, 20 Wend. 111, aff'd 22 Wend. 425 .....                     | 37         |
| People v. B. & O. R. R. Co., 117 N. Y. 150 .....                             | 36         |
| People v. Lambier, 5 Denio 9 .....   | 33         |
| People v. Mallory, 46 How. Pr. 281 .....                                     | 25         |
| Peters v. Veasey, 251 U. S. 121 .....  | 11         |
| <i>Roanoke, The</i> , 189 U. S. 185 .....                                    | 11         |
| Robins Dry Dock Co. v. Dahl, 266 U. S. 449 .....                             | 11         |
| Rodgers v. The City of New York, 285 Fed. 362 .....                          | 12         |
| Rumsey v. N. Y. & N. E. R. R. Co., 133 N. Y. 79 .....                        | 19         |
| Shively v. Bowlby, 152 U. S. 1 .....   | 14, 16     |
| Southern Pacific Co. v. Jensen, 244 U. S. 205 .....                          | 10, 11, 12 |
| Steamship Bowdoin Co. v. Industrial Accident Commission, 246 U. S. 648 ..... | 10         |
| Taylor v. Atlantic Mutual Insurance Co., 37 N. Y. 275 .....                  | 23         |
| The New Zealand Ins. Co. v. Earnmoor S. S. Co., 79 Fed. 368 .....            | 11         |
| The Steamboat New York v. Rea, 18 How. 223 .....                             | 11         |
| Thompson v. The Mayor, etc., of New York, 11 N. Y. 115, 121 .....            | 28         |
| Transportation Co. v. Parkersburg, 107 U. S. 691 .....                       | 14, 15     |
| Union Fish Co. v. Erickson, 248 U. S. 308 .....                              | 10, 11     |
| Vandewater v. The City of New York, 2 Sandf. 258 .....                       | 25         |
| Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. 81, 91 .....                    | 26         |
| Vicksburg v. Tobin, 100 U. S. 430 .....                                      | 14         |

# INDEX

v

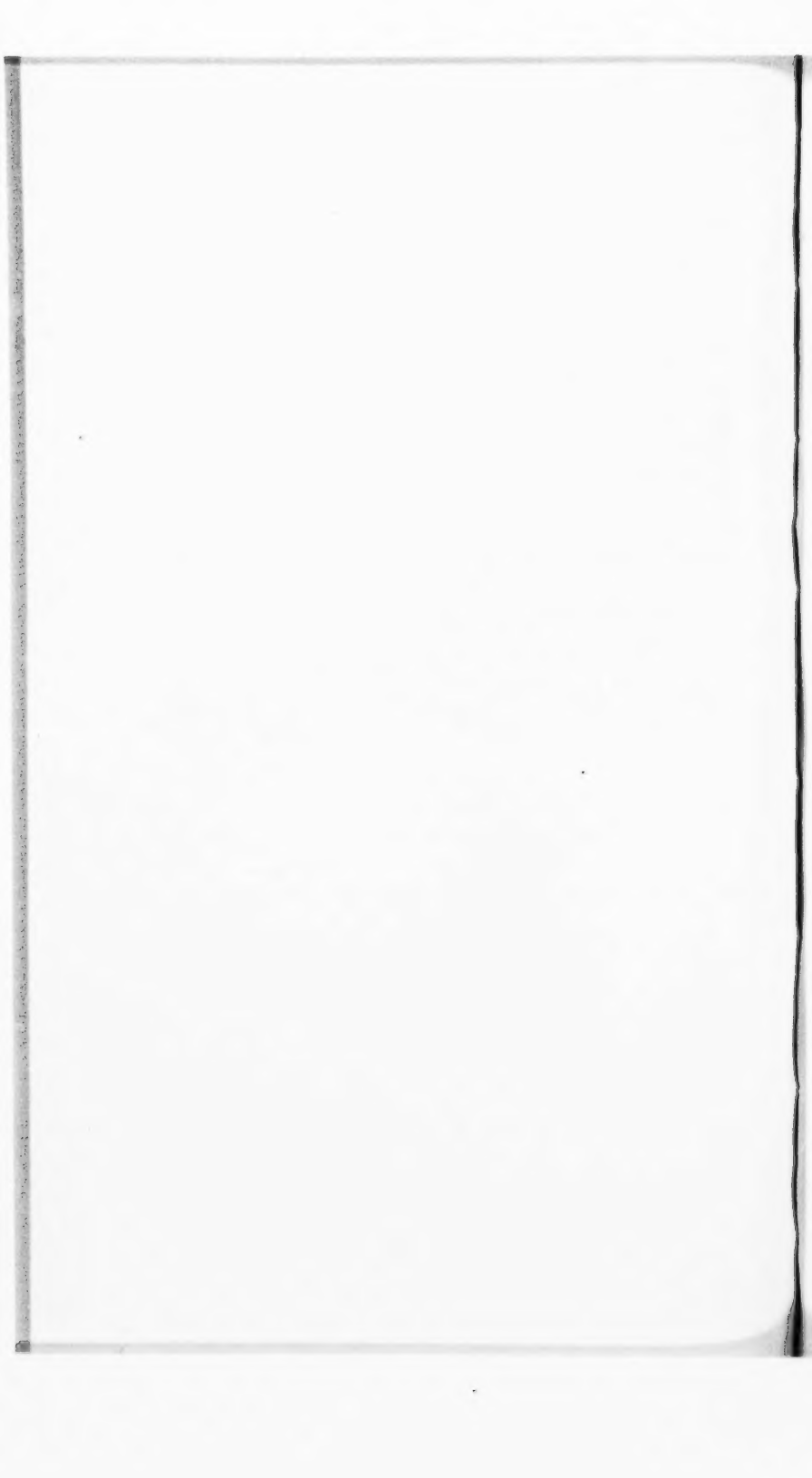
|   | PAGE       |
|---|------------|
| Washington v. Dawson, 264 U. S. 219.....                              | 11         |
| Watts v. Camors, 10 Fed. 145 .....                                    | 11         |
| Weems Steamboat Co. v. People's Steamboat Co., 214<br>U. S. 345 ..... | 20, 36     |
| Wetmore v. Atlantic White Lead Co., 37 Barb.<br>70 .....              | 19, 33, 36 |
| Wetmore v. Brooklyn Gas Light Co., 42 N. Y.<br>384 .....              | 19, 33, 36 |
| Woodruff v. Havemeyer, 106 N. Y. 129.....                             | 31         |
| Workman v. New York, 179 U. S. 552 .....                              | 12         |

## STATUTES.

|   |              |
|---|--------------|
| The Constitution, Art. III, Sec. 2; Art. I, Sec. 8..... | 11           |
| Greater New York Charter, Sec. 859 .....                | 6, 9, 27, 32 |
| Greater New York Charter, Sec. 862 .....                | 31           |

## TEXTBOOKS.

|  |    |
|--|----|
| The Cornell Law Quarterly (Vol. X, p. 303, April,<br>1925) on "The Seashore and the People"..... | 34 |
|--|----|



# Supreme Court of the United States

OCTOBER TERM, 1926.

NEW YORK DOCK COMPANY,  
Petitioner,

*against*

Steamship "POZNAN," her engines, etc.,  
and JOHN B. HARRIS COMPANY,  
Respondents.

No. 229.

## REPLY BRIEF FOR PETITIONER.

In the preparation of the petitioner's brief an earnest endeavor was made to eliminate all surplus matter and to state clearly in condensed form the ultimate facts of this case and the questions of law to be considered, and to present the argument and authorities in support of the petitioner's contention briefly and in logical sequence. This was done under a compelling sense of the obligation to conserve the time and energies of this Court. With full realization of this obligation this reply brief is submitted, not for the purpose of elaborating or reenforcing such brief, but solely for the purpose of pointing out a few of the fallacies in the respondent's argument, and replying to the questions raised for the first time in its brief filed herein and not presented by the record.



**PART I.****POINT I.**

**In this cause the respondent represents all of the libellants in the so-called consolidated cause and may not now for the first time make its defense individual and separate.**

Throughout its brief (notably at pp. 31-33, 49) the respondent seeks to disassociate itself from the other libellant in the consolidated libel, and to show that it never objected to the removal of the vessel from the petitioner's wharf and never consented to her remaining there. It seeks further to draw a distinction between the claims against the vessel and the claims against her cargo, insisting that the use of plaintiff's wharf was principally for the benefit of the claimants of the cargo, and that it was not such a claimant. Such effort is entirely without merit.

The intervention of John B. Harris Company is on its own behalf and on behalf of all the libellants in the consolidated cause. It is the representative of a class and has been so treated throughout this litigation. The appearance of Hunt, Hill & Betts, Esqs., before the Special Commissioner was "for John B. Harris Company, Intervenor, and the other libellants in the consolidated cause of *Joseph H. Davis* against the *Steamship 'Poznan'* " *et al.* (R., 42). They signed the Intervenor's notice of appeal (R., 141), its assignments of error (R., 144) and the stipulation as to the transcript of the record on appeal (R., 144) in the same capacity. To the same effect are the exceptions to the report of the Special Commissioner (R., 135-6). Furthermore in the stipulation of facts (R., 131-2) appears the following:

"Since the Polish-American Navigation Corporation and the Acme Operating Corporation proved not to be financially responsible, by an agreement entered into between all the consolidated libellants dated October 10, 1922, the hearing before Judge Lacombe was terminated after five of the consolidated libellants had proved claims aggregating approximately \$440,000. By such agreement, all the consolidated (fol. 173) libellants agreed that the recovery under the final decree on behalf of the libellants, who had proved their claims before the Commissioner, should be paid to the Trustees and distributed by the Trustees in accordance with the orders of a committee of six proctors selected by all the consolidated libellants acting pursuant to the agreement. The committee found the total claims of all the libellants to be approximately \$1,216,000, and up to date have ordered the payment of a dividend of 17 per cent of each libellant's claim as finally allowed by the committee. After payment of this dividend, the balance remaining in the hands of the trustee is approximately \$38,000 of which \$20,000 is agreed to be held to secure the claim of the New York Dock Company in accordance with stipulation dated November 25, 1922."

And at no stage of the proceedings was there any effort to divide the libellants in the consolidated cause into cargo claimants and claimants against the vessel, and there is no warrant for doing so now. The cargo was in possession of the vessel, not of her owner or charterer. All the claims were against the vessel, either for possession of the cargo or for damages. For the purposes of this suit it is immaterial which of these libellants was responsible for the vessel's use of the petitioner's wharf. All are bound by the conduct of each so far as the order of January 5, 1921 (R., 36 and 37) and this

hearing are concerned. The arrest of the vessel was necessary whether the libel was to recover damages for breach of contract of affreightment, or for possession of cargo, and the just and reasonable value of such use is a legitimate charge against or a maritime lien upon the vessel and her proceeds.

## POINT II.

**The amount of the petitioner's recovery in the District Court should be accepted by this Court.**

The questions of the fair and reasonable value of the use of the petitioner's wharf and the amount it was entitled to recover for such use, were fairly and fully tried before the Special Commissioner (R., 42-132), who reported such value to be \$250 per day with certain additions for incidentals (R., 132). To this the respondent excepted (R., 135). Its exceptions were overruled and final decree entered accordingly by the District Court (R., 137-140). The respondent appealed to the Circuit Court of Appeals and assigned as error the excessive amount of the recovery (R., 142, Sixth and Seventh assignments). The Circuit Court of Appeals, in its opinion covering more than twenty pages of the record (R., 145-166) did not question the reasonableness of the recovery, but denied any recovery on other grounds. Notwithstanding this, the respondent throughout its brief has used such expressions as "exorbitant claim for wharfage" (p. 12) "enormous claim for wharfage" (p. 36), "mulcted with a large sum for wharfage" (p. 59), and seeks to try again in this Court the question of what is the fair and reasonable value of the use of the petitioner's property.

It is respectfully submitted that this Court should accept as the fair and reasonable value of the use of the

petitioner's wharf the amount found below. If, however, this Court should deem it proper to do otherwise, then, we respectfully submit that the findings of the Special Commissioner and the District Court are abundantly sustained by the stipulated facts (R., 8-37, 131) the testimony of the witnesses and the documentary evidence (R., 42-132).

### POINT III.

**The discussion of the *St. Paul* case in respondent's brief is misleading.**

Attempting to distinguish the *St. Paul* case from the case at bar, the respondent at page 43 of its brief says that the right of the petitioner to resort to the proceeds of the *Poznan* to satisfy its claim for wharfage is precisely the one

“which was not disputed or litigated in *The St. Paul*, where the Court and all the parties were in agreement that wharfage as one of the discharging expenses, was to be paid out of the fund in Court and was to have priority.”

This statement is not in accordance with the facts. The wharfage in dispute in that case was the wharfage which accrued after the cargo was discharged, and which the Court had refused to allow as a charge against the cargo. The precise question litigated and decided was whether this claim for wharfage should be allowed as a charge against the proceeds of the vessel. The Court and the parties were not in agreement. The Hudson Navigation Co., the appellant, was asserting a claim against such proceeds through the marshal's bill of costs. The appellee was resisting such claim. The Circuit Court of Appeals al-

lowed it, not as a part of the marshal's bill, but as a claim *against the vessel and her proceeds.*

Furthermore the respondent on page 44 incorrectly asserts that the *St. Paul* case is direct authority for allowing the petitioner only \$29.49 a day, because the *Poznan* was later berthed somewhere at that cost. This same argument was made in the District Court and was disposed of in the opinion of Judge AUGUSTUS N. HAND, as follows (R. 138):

"This is not a sound argument against the wharfinger. It was not the latter's fault that the ship was not removed from the pier in question. The cargo owners opposed a motion of the owner and the charterer of the ship to remove her. The question is not whether some other pier was better. The ship was at the libellant's pier and the cargo owners kept her there. They received the benefit of shelter and discharge from the use of libellant's property. I can conceive of no reasonable measure of this benefit except the reasonable value of the particular wharfage enjoyed and the incidental services rendered. *There was no duty upon the wharfinger as in The St. Paul, 271 Fed. 265, to remove the ship to a less expensive place.*" (Italics ours.)

#### POINT IV.

**The New York State Wharfage Statute is not now available to the respondent as a defense or as evidence of the value of the use of petitioner's property.**

The respondent at page 57 of its brief undertakes to set up the New York State Wharfage Statute (Greater New York Charter, Section 859) as a bar to the recovery

of wharfage by the petitioner at a greater rate than \$29.49 per day. Such defense was not relied upon in either of the courts below. Failure to so limit the petitioner's recovery was not assigned as error on the appeal and there is nothing in the record to show that the question was raised in either court. As the case is to be heard in this Court on the record in the Circuit Court of Appeals, it is respectfully submitted that this question should not be raised here for the first time.

The respondent should not be allowed to offer this statute here as evidence of what is the just and reasonable value of the use of the petitioner's property, because there has been no order of the Court permitting such addition to the record and because the petitioner has had no notice of the purpose to offer such evidence or opportunity to offer further evidence of such value.

The District Court found that the fair and reasonable value of the use of petitioner's wharf by the vessel was \$250 per day and this finding was not disturbed by the Circuit Court of Appeals. If the petitioner may not recover the contract price for the use of its property, still under the maritime law, it is entitled to recover just and reasonable value of such use. *Ex parte Easton*, 95 U. S. 68, 73. This is the only rule known to the maritime law, and the libel in this case being *in rem*, the Court can apply no other measure. It is inconceivable that on the evidence in the record any court could find \$29.49 a day to be the just and reasonable value of the use of shedded pier 494 feet long and 70 feet wide in the harbor of New York (R. 44) at the end of 1920 and the beginning of 1921, when there shipping was still congested as a result of the war.

To ask that the petitioner be awarded only \$29.49 per day for the use of its privately owned property when the

just and reasonable value of such use has already been found by a court of competent jurisdiction to be \$250, is to ask that the Fifth Amendment and the first section of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 6 of the Constitution of the State of New York be all violated, and such fundamental law is here invoked as a protection against such award.

Therefore the petitioner respectfully submits that the respondent should not be heard in this Court for the first time to plead the New York State wharfage statute as a bar to the petitioner's recovery of the just and reasonable value of the use of its property or to use it as evidence of what such value is.

However, if the Court should decide to consider said statute in any aspect, then the petitioner respectfully asks that consideration be given to the authorities cited and the arguments presented in the following Part II of this reply brief.

**PART II.**

**SECTIONS 859 AND 863 OF THE GREATER NEW YORK CHARTER HAVE NO APPLICATION TO THE PETITIONER'S PIER NO. 6 IN ANY EVENT, BECAUSE THESE SECTIONS AND THEIR EVERY PREDECESSOR SINCE 1784 WERE ENACTED WITH SOLE REFERENCE TO PUBLIC WHARVES, MEANING THEREBY WHARVES WHICH THE PUBLIC HAS THE RIGHT TO USE, AND WERE NEVER INTENDED TO APPLY TO PRIVATE WHARVES, MEANING THEREBY WHARVES WHICH ARE PRIVATE PROPERTY AND WHICH NO ONE MAY USE EXCEPT BY THE PERMISSION OF THE OWNER, —SUCH AS ADMITTEDLY IS THE WHARF INVOLVED IN THIS CAUSE.**

**POINT I.**

Construed as an attempt to limit the right of recovery against a vessel under a maritime contract, Section 859 of the Greater New York Charter, is in conflict with Article III, Section 2 and Article I, Section 8, of the Constitution of the United States as an invasion of the admiralty and maritime jurisdiction, and therefore invalid.

The case of the *M. L. C. No. 10*, C. C. A. 2, 699, cited by respondent on page 56 of its brief is not in point. The controlling consideration in the decision of that case was the fact that the wharf, though privately owned, was devoted to the use of the public, and that the owner had "invited all and sundry to come," and that therefore it was so far a public wharf that the state might regulate



the rates of charge. There is nothing in the record to show that petitioner's pier No. 6 was devoted to the use of the public or was in any sense a public pier. The *Poznan* came to this pier in the usual way, under contract with the owner of the pier. The invalidity of Section 859 of the Greater New York Charter as an invasion of the admiralty and maritime jurisdiction was not passed upon by the Court in that case.

The case of *Southern Pacific Co. v. Jensen*, 244 U. S. 205, is decisive of this point. In that case the Court quotes Mr. Justice BRADLEY, delivering the opinion of the Court in *The Lottawanna*, 21 Wall. 558, as follows:

"That we have a maritime law of our own operative throughout the United States, cannot be doubted . . . the Constitution must have referred to a system of law coextensive with, and operating uniformly in the whole country. It certainly could not have intended to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed in all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

Following this interpretation of the Constitutional grant of the admiralty and maritime jurisdiction, this Court held the New York State Workmen's Compensation Act invalid as affecting the right of recovery for the death of a stevedore, at the time engaged in a maritime service.

This case has been cited and followed by this Court numerous times, notably in *Steamship Bowdoin Co. v. Industrial Accident Commission*, 246 U. S. 648; *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372; *Union Fish Co. v. Erickson*, 248 U. S. 308; *Coon v. Kennedy*, 248 U. S. 457;

*Peters v. Veasey*, 251 U. S. 121; *Knickerbocker Ice Co. v. Stewart*, 253 U. S., 149; *Osaka Shosen Kaisha v. Lumber Co.*, 260 U. S. 490; *Great Lakes Co. v. Kierejewski*, 261 U. S. 479; *Washington v. Dawson*, 264 U. S. 219; *Robins Dry Dock Co. v. Dahl*, 266 U. S. 449. The rule there laid down has not been departed from.

“ \* \* the Constitution adopted the law of the sea as the measure of maritime rights and obligations.”

*Washington v. Dawson*, 264 U. S. 219, 228;

*The Constitution*, Art. III, Sec. 2; Art. I, Sec. 8.

The “rights and obligations” of the parties arising either under a maritime contract or from a maritime tort, are exclusively within the admiralty and maritime jurisdiction, and cannot be “enlarged or impaired” by state statute or common law rule. State statutes have been held invalid as attempts (1) to create a lien for repairs to a vessel in a foreign port (*The Roanoke*, 189 U. S. 185); (2) to apply workmen’s compensation under the contract of a seaman (*Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372); (3) to apply workmen’s compensation under the contract of a stevedore (*Southern Pacific Co. v. Jensen*, 244 U. S. 205); (4) to limit the time in which recovery may be had (*The Key City*, 14 Wall. 653); (5) to allow interest in a general average adjustment (*The New Zealand Ins. Co. v. Earnmoor S. S. Co.*, 79 Fed. 368); (6) to require a contract to be in writing (*Union Fish Co. v. Erickson*, 248 U. S. 308); (7) to define liability under a maritime contract of affreightment (*Osaka Shosen Kaisha v. Lumber Co.*, 260 U. S. 490); (8) to provide for recovery of a penalty instead of actual damages (*Watts v. Camors*, 10 Fed. 145); (9) to prescribe rules of navigation (*The Steamboat New York v. Rea*, 18 How. 223); (10) to create

priority in the payment of claims (*The J. E. Rumbell*, 148 U. S. 1); (11) to exempt a municipality from liability for injury inflicted by its fire-boat (*Workman v. New York*, 179 U. S. 552); (12) to prescribe the manner of the presentation and proof of claims (*Rodgers v. The City of New York*, 285 Fed. 362).

Since the decision in *Southern Pacific Co. v. Jensen* it has only remained for this Court to apply the rule there laid down. In *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469), a state workmen's compensation act was held applicable in the case of a carpenter working on an unfinished ship lying in navigable water, because the contract for the construction of the vessel was non-maritime and his activities had "no direct relation to navigation or commerce." So, too, in *Millers' Indemnity Underwriters v. Boudreaux*, decided by this Court, February 15, 1926, state workmen's compensation was upheld where a diver was drowned while sawing off a submerged pile, because the act was of "mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law."

Wharfage, the subject of the instant suit, is essentially maritime. It can accrue only upon the rendition of a service to or the conferring of a benefit upon a vessel in the regular course of navigation and maritime commerce.

"These remarks are sufficient to show that wharves, piers and landing places are well nigh as essential to commerce as ships and vessels, and are abundantly sufficient to demonstrate that the contract for wharfage is a maritime contract."

*Ex Parte Easton*, 95 U. S. 68, 75.

What are the rights and obligations of the parties to a contract for wharfage as measured by the law of the sea?

This Court has given the following answer:

"Compensation for wharfage may be claimed upon either an express or an implied contract, according to the circumstances. Where a price is agreed upon for the use of the wharf, the contract furnishes the measure of compensation; and when the wharf is used without any such agreement, the contract is implied, and the proprietor is entitled to recover what is just and reasonable for the use of his property and the benefit conferred."

*Ex Parte Easton*, 95 U. S. 68, 73.

Wharfage is not of merely local concern, as, for example, is the service of a carpenter on an unfinished vessel lying in navigable water (*Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469), or the service of a diver removing a submerged pile (*Millers' Indemnity Underwriters v. Boudreaux*, decided by this Court, February 15, 1926), but is a necessary incident to the operation of a vessel as the agency of maritime commerce. The *rule* by which it is to be *measured* is a characteristic feature of the general maritime law and is of vital concern to such commerce generally. The wharves are local, as were the unfinished vessel and the submerged pile, but the *measure* of liability for their use by a vessel is general and must be *uniform*. The exigencies of navigation are such that it is not always possible to bargain for the rate of compensation to be paid for wharfage, and it is of prime importance for vessels everywhere to know that in the absence of an express agreement they shall be liable for and only for the just and reasonable value of the use of the property and the benefit conferred, and that a court of admiralty has the exclusive jurisdiction to determine what is just and reasonable in any given instance. In no other way can the uniformity contemplated by the Constitution

be secured in an incident of maritime commerce well nigh as essential as vessels themselves.

The principle as above stated has been applied to the subject of wharfage by the highest Court of the State of New York. In *Brookman v. Hamill*, 43 N. Y. 554, the Court of Appeals held invalid a state statute creating a lien for wharfage on the ground that it is maritime in its nature, giving rise to a lien under the maritime law, and is exclusively within the admiralty and maritime jurisdiction. This case was cited as authority by this Court in *Edwards v. Elliott*, 21 Wall. 532, 557. Furthermore, the Legislature of New York has acknowledged its lack of power to vary the liability of a vessel under a contract for wharfage, by amending the statute providing for liens on vessels so as to restrict it to cases where there "is not a lien by the maritime law" (New York Lien Law, Sections 80 and 81). *Obviously if the Legislature is thus without power to impose any liability on a vessel in rem, it has no power to limit her obligation when sued in rem in a court of admiralty.*

In what is said above we have not overlooked a line of decisions which may seem to, but do not, lead to a different conclusion (*Transportation Co. v. Parkersburg*, 107 U. S. 691; *Packet Co. v. Keokuk*, 95 U. S. 80; *Packet Co. v. St. Louis*, 100 U. S. 423; *Vicksburg v. Tobin*, 100 U. S. 430; *Packet Co. v. Catlettsburg*, 105 U. S. 559; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444; *Cannon v. New Orleans*, 20 Wall. 577; *Shively v. Bowlby*, 152 U. S. 1). In these decisions there is found language, more or less general, to the effect that wharves, being local in their nature, are under the jurisdiction and control of the states where located, in the absence of congressional legislation on the subject. However, on examination these cases will be found to be distinguishable from the suits at bar. In the

first place it will be seen that they are common law actions or suits in equity against the owners of vessels and were not admiralty proceedings *in rem*. In the second place it will be seen that the decisions are based on the commerce clause of the Constitution (Article I, Section 8, Clause 3) or on the Constitutional inhibition against tonnage duties (Article I, Section 10, Clause 3), and the question of the admiralty and maritime jurisdiction was not raised or passed upon. And it will be seen further that the wharves involved were not private wharves, as is the one involved in the instant suit, but were public wharves in the sense that the public had a right to use them, because the property was affected with a public interest, either by virtue of ownership or by virtue of their operation under a franchise granted by the state.

In *Transportation Co. v. Parkersburg* (*supra*) for example, the appeal was from a decree dismissing a bill in chancery on demurrer. The bill was for the recovery of wharfage already paid and for an injunction against the collection of wharfage in the future. The wharves were municipal property of the City of Parkersburg. They were public in the sense above stated. This Court held that the charge by the City for their use was not a regulation of interstate commerce or a duty of tonnage. The admiralty and maritime jurisdiction was not a point in the case. The Court emphasized the distinction between public and private wharves as follows:

"It is undoubtedly a general rule of law, in reference to all public wharves, that wharfage must be reasonable. A private wharf, that is, a wharf which the owner has constructed and reserves for his private use, is not subject to this rule; for, if any other person wishes to make use of it for a temporary purpose, the parties are at liberty to make their own bargain."

In *Cannon v. New Orleans, supra*, the question decided was whether a charge imposed on all steamers mooring or landing in the port of New Orleans was a duty of tonnage. It was held that it was, and that the City Ordinance imposing it was therefore invalid. The Court added :

"It is a doctrine too well settled, and a practice too common and too essential to the interests of commerce and navigation to admit of a doubt, that for the use of such structures (wharves), erected by *individual* enterprise, and recognized everywhere as private property, a reasonable compensation can be exacted. And it may be safely admitted also that it is within the power of the state to regulate this compensation, so as to prevent extortion, a power which is often very properly delegated to the local municipal authority."

In that case, the charge imposed being held to be a duty of tonnage, its reasonableness as wharfage and the right of the State to regulate it as such were not issues, and the above quotation was not necessary to its decision. The question of the admiralty and maritime jurisdiction was not raised.

In *Shively v. Bowlby, supra*, it was merely held that the tenure of shore property is governed by the law of the state where located, and that title to land under water and between high and low water mark is in the state until it is granted to another owner. The decision is not in point in the instant case, since the petitioner has succeeded to whatever title the state had to the land on which its pier is built.

The admiralty and maritime jurisdiction of the Federal courts is granted by the Constitution and cannot be limited or delegated to the States by congressional action (*Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149). It is

broadier than and entirely independent of the constitutional grant to Congress of the right to regulate interstate and foreign commerce. In *The Belfast*, 7 Wall. 624, 640, Mr. Justice CLIFFORD, delivering the opinion of the Court said:

"Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce, as conferred in the Constitution. They are entirely different things, having no necessary connection with one another, and are conferred, in the Constitution, by separate and distinct grants."

The foregoing was quoted with approval in *In re Garnett*, 141 U. S. 1, 12, where the Court added:

"It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends."

It follows, therefore, that if commerce is *maritime*, whether interstate or intrastate, the State has no power to limit the rights and obligations of the parties engaged therein, although Congress has not undertaken to deal with the particular subject involved. The commerce involved in the instant suit is essentially maritime. Wharfage, the subject of the suits, is a necessary incident of *maritime* commerce alone, and by virtue of the *maritime* nature of such commerce is beyond the reach of State legislation, even though Congress has not dealt with the subject.

In the following point it will be shown that Section 859 of the Greater New York Charter is not a prohibitive statute and is inapplicable to petitioner's pier No. 6.



## POINT II.

**The statutes under consideration are applicable to public wharves only.**

That the statutes under consideration are applicable only to wharves which the public has the *right* to use, that is, to *public* wharves, was decided in *Murphy v. Voorhis*, 10 Daly 457, cited by the court in *The Allan Wilde*, 264 Fed. 291. That was a suit to recover the statutory penalty of treble damages for exacting and receiving more than the statutory rates of wharfage at a wharf in the City of New York. The charge complained of was "three dollars per day as dockage for a canal boat *lying and unloading at the bulkhead*." The plaintiff was denied a recovery on the ground that he had not shown that the bulkhead in suit was one of the class of bulkheads to which the act of the legislature was applicable; that is, on the ground that the plaintiff had offered no evidence to show "*that the upland was a highway, or that he was entitled to pass over it without the defendant's permission for the purpose of reaching the bulkhead*." The Court held that unless the plaintiff proved that he had the *right* to use the wharf without permission of the owner, that is, unless it was a *public* wharf, the statute did not apply. It is a clear recognition of the two classes of wharves as described above and a holding that these statutes only apply to *public* wharves, that is, to such as a person has the *right* to use as he does a highway, and does *not* apply to *private* wharves, that is, to those that a person cannot lawfully use without *permission* of the owner.

The petitioner's pier, No. 6, is not a public wharve within the meaning of this decision, but is private, and no one may use it for any purpose whatever except by permission or license from the owner.

**POINT III.****The libellants' wharves are not public but are private wharves.**

It is conceded that the petitioner's pier No. 6 is privately owned, and there is no evidence that its use was ever granted to the public. From the record the contrary clearly appears. The Brooklyn waterfront, where the petitioner's pier is located, has been developed under the riparian rights of the upland owners. Among these rights is the right to build piers out to the navigable part of the river, subject to the superior right of the public to navigate the stream. A different rule was applied in one case to land on the Hudson River in Columbia County, but the decision in that case was discredited and expressly overruled (*Rumsey v. N. Y. & N. E. R. R. Co.*, 133 N. Y. 79).

It is true that at an early date the Crown granted to the City of New York the land between high and low water mark on this part of the Long Island shore; but the upland owners first leased the interest of the City in this tideway for a small rental and later secured such interest in fee. The State established bulkhead lines and permitted these upland owners to fill in land under water and build piers and wharves beyond low water mark. The effect of this was to extend the upland as private property. There was no requirement that such extension should be open to the public.

A pier thus erected there is private property in the fullest sense, and no one may use it except by permission of the owner. This was decided in *Wetmore v. Atlantic White Lead Co.*, 37 Barb. 70, which was followed in *Wetmore v. Brooklyn Gas Light Co.*, 42 N. Y. 384, where the Court said:

"The public never had any right of landing upon these lands of the defendant, or of crossing or in any way using the same for any purpose. *The public right upon the Brooklyn side was confined to that of navigating the river.* How the right of navigation should confer upon the plaintiff any right to use these lands, it is difficult to discover. \* \* \* He can enjoy his right to navigate the river in as free and ample a manner as before (the erection of the wharf). *He had no right to unload or load his vessels at this place before and he has none now.*"

As an incident to the private ownership of such piers, the owners may charge and receive whatever rate of wharfage they may agree upon with their customers. Lord HALE, in his treatise *De Portibus Maris*, laid it down as the law that a riparian owner for his own private advantage might set up a wharf and take whatever rates his customers would pay, because he would be doing "no more than is lawful for any man to do, viz., make the most of his own." And this is still the law (*Dutton v. Strong*, 66 U. S. 23, 1 Black 23; *Louisville, etc., R. R. Co. v. West Coast Co.*, 198 U. S. 483; *Weems Steamboat Co. v. People's Steamboat Co.*, 214 U. S. 345; *The Allan Wilde*, 264 Fed. 291).

On Manhattan Island, owing to a tenure of the shore peculiar to that locality, an entirely different rule obtains. The upland owners have no riparian rights. As such they have no right to build wharves or collect wharfage. No one has the right to collect wharfage there except as a franchise granted by statute. All the wharves are *public* wharves, in the sense that the streets of the city are, which the public has the *right* to use, except in so far as such right has been limited by statute. It was with sole reference to such wharves that the statutes un-

der consideration were passed, and as decided in *Murphy v. Voorhis, supra*, to such wharves only are the statutes applicable. This becomes more evident when the tenure of the Manhattan water front and the history and purpose of the statutes are considered.

#### POINT IV.

**Section 859 of the Greater New York Charter is wholly inapplicable to wharfage at private wharves such as the libellants' wharves are.**

This becomes evident upon consideration of (1) the tenure of waterfront property in Manhattan, (2) the language of the statutes, (3) its origin and purpose, (4) its effects and consequences, and (5) the practical construction placed on this and kindred statutes.

##### 1.

#### **The Tenure of Waterfront Property on Manhattan.**

By the Dongan charter of 1686 and the Montgomerie charter of 1730 the Crown granted to the City of New York the land on Manhattan Island between high and low water mark and the land under water for four hundred feet beyond low water mark, with full power to erect wharves and collect wharfage. As a result the owners of the upland were left without any riparian rights, and the waterfront was developed by the City itself or by its direction, or under grants from the City by authority of the Legislature. It is useless now to inquire by what authority the upland owners were deprived of their common law right of access to the navigable parts of the rivers around the island. It is sufficient to know that it was an accomplished fact.

In 1857, in *Hecker v. New York Balance Dock Co.*, 24 Barb. 215, this subject was thoroughly investigated and ably argued by no less eminent counsel than David Dudley Field for the plaintiffs and Samuel J. Tilden for the defendants, the value of whose labors was acknowledged in the Court's opinion. In delivering the opinion of the Court, Justice DAVIES said:

"These grants have been held by the highest court in this state as vesting the absolute ownership of the soil under water from high water mark, to 400 feet beyond low water mark, in the corporation, with full power to sell the same, and to make and erect streets thereon, without the consent of the owner of the adjoining land at high water mark, and thereby entirely excluding and cutting him off from access to the water."

In that case the Court followed *Furman v. The City of New York*, 5 Sandf. 16, which was affirmed by the Court of Appeals (10 N. Y. 567).

Justice DAVIES then gave a synopsis of the legislative authority under which the waterfront was developed. The principal features of the plan adopted by the City under such authority (Act of 1798) were a marginal street between which and the river no buildings of any kind could be erected except piers and bridges as approaches to them. In some instances these piers and bridges were built by the City; others were required to be erected by the owners of the lots opposite, and, upon their failure to do so, by the City at the owners' expense or by such persons as the City might grant the privilege of doing so. The dominant purpose throughout the whole plan was to make the piers and wharves public and to protect the right of the public to use them as they did the streets of the City. The Legislature made it lawful for those erect-

ing or leasing such piers to collect wharfage at certain rates. It follows, therefore, that the right to collect any wharfage for the use of these piers was due solely to the Legislative grant or franchise, and not by virtue of ownership of the property.

In *Taylor v. Atlantic Mutual Insurance Co.*, 37 N. Y. 275 (decided in 1867), the Court said:

"These wharves and piers are streets of the City of New York, for the free passage of all citizens, and are so declared by statute. The only revenues authorized to be derived therefrom are the wharfage, already referred to, (*i. e.*, that authorized by the statute), and the charge authorized to be made by the third section of the act of 1860, already adverted to (*i. e.*, top wharfage)."

The *right* of the public to use these Manhattan piers and wharves was jealously guarded. When title to land under water was granted to a private individual, this right was carefully protected. The grantees of land under water were required to covenant that the piers and wharves erected thereon should be *forever maintained as public streets and highways*. On the Brooklyn waterfront, the public had no such rights; and consequently it will be noted that no such reservation is to be found in the grants of land under water in Brooklyn, one of which is printed in the Record (fols. 331-345).

In *Langdon v. The Mayor, etc., of New York*, 93 N. Y. 129, such a grant to John Jacob Astor was involved and it contained such a covenant. In this case (decided in 1883) Judge EARL, delivering the opinion of the Court, gives a comprehensive and most enlightening historical review of the legislative authority under which the Manhattan waterfront was developed and of the rights acquired by the grantees or lessees of the piers and wharves

built pursuant thereto. It was held that the right to wharfage was by virtue of the legislative grant but was property and could not be taken or destroyed without compensation.

Again, in 1888 in *Kingsland v. The Mayor, etc., of New York*, 110 N. Y. 569, this subject was again ably argued and carefully considered. The Court in an exhaustive opinion delivered by Judge FISH held that upon the taking or destruction of the right to wharfage granted by the City to the owner, the subject to be valued was an

“ \* \* \* incorporeal right which can only exist by force of the law and under its shelter (*Langdon v. Mayor, etc., supra*) and can never be more than that the law creates or sanctions.”

As commerce increased and it became convenient for certain boat lines to have regular places for landing on the Manhattan shores of the Hudson and East Rivers, Chapter 261 of the Laws of 1858 was enacted. This act provided that when the “owners of any wharves or slips” on the North or East Rivers in the City of New York, should lease the same to certain regular lines of steamboats, “the wharves and slips so leased shall, during the term of the lease, be kept and reserved for the exclusive use and occupancy of the steamboats of the lessees *to the extent necessary for the conducting and doing of the business in which they are engaged.*” The act then expressly provides to what extent the use of such wharf or slip is thus curtailed. Except as thus limited, the public might still use them. See *Commissioners of Pilots v. Clark*, 33 N. Y. 251.

When the lessees of these Manhattan piers began to build sheds to protect the merchandise deposited on them, there was protest on the ground that such sheds interfered

with the free use of the piers by the public, and such sheds were declared unlawful. In *People v. Mallory*, 46 How. Pr. 281, after referring to the various statutes on the subject, the Court said:

"All these are expressions of the legislative intent that the wharves and piers should not be incumbered, the design being to give to and preserve for them the character of highways—to make them part of the public streets."

There are references in the reports to both *public* and *private* wharves on Manhattan, but this was to distinguish those *owned* outright by the City from those that were *owned* by private individuals. As far as is known all were *public* in the sense that the public had the right to use them as streets. (*Hecker v. New York Balance Dock Co.*, 24 Barb. 215; *Vandewater v. The City of New York*, 2 Sandf. 258.) Some were private property in all respects, with the exception that the public had the *right* to use them unless restricted by the legislature, and the further exception that the owners had *no right* to collect wharfage for their use by the public except to the extent made lawful by the legislature. And this makes intelligible the language of the statute under consideration. It confers this right.

## 2.

### The Language of the Statute.

The language of the statute is that "it shall be lawful to charge and receive, within the City of New York, wharfage and dockage from every vessel" at certain rates. The language is the grant of a privilege or franchise and nothing more. It is an enabling statute. It contains no words of restriction or prohibition. It "con-



fers a right" (*The Antonio Zambrana*, 88 Fed. 546), but it does not make unlawful the exercise of any existing right. It confers no right that the owner of a private wharf does not already have at common law, nor does it abridge his common law rights in any respect. The words "that it shall and may be lawful" are permissive and not peremptory. *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 84, 91.

The language of this statute has remained practically the same since it was first enacted in 1784 (Revised Laws 1792, ch. 32) in the following words:

"Be it therefore enacted, etc. That it shall and may be lawful to and for the present owners and proprietors of the said mentioned wharfs, or the owners or proprietors thereof for the time being, to ask, demand, take and receive to and for their several and respective uses \* \* \*. For each ship or other vessel, of the burthen of sixty tons, and under the burthen of one hundred tons, at and after the rate of three shillings per day \* \* \*."

The language of this statute as originally enacted and as it now stands, is wholly unlike the language usually employed when it is the purpose of the legislature to fix or regulate the rates to be charged the public for the services of private persons or the use of private property.

Standing alone it means nothing to the owner of a private wharf, who has always had the right to charge what he pleased. If, however, it is read in connection with Section 863 of the Greater New York Charter, which provides for the recovery of treble damages by one who pays more than the rates named, it is not only in derogation of the common law but is also highly penal, and must be strictly construed.

"§863. It shall be the duty of every person owning or having charge of any pier, wharf, bulkhead, or slip in the city of New York, to cause to be printed on the backs of all bills, presented by them for wharfage, section eight hundred and fifty-nine of this act, and the owner, consignee, or person in charge of any vessel shall not be required to pay the wharfage or dockage due on such vessel, unless upon his demand the bill printed in conformity with this section is presented to him. Any person owning or having charge of any pier, wharf, bulkhead, or slip as aforesaid, who shall receive for wharfage any rates in excess of those now authorized by law, shall forfeit to the party aggrieved, treble the amount so charged as damages, to be used for and recovered by the party aggrieved."

It will not be presumed, if the statute will bear any other construction, that the legislature intended to subject a man to treble damages for the exercise of a common law right which has not been prohibited and which is not injurious to the public. This is fully borne out by the origin and purpose of the statute.

### 3.

#### **Origin and Purpose of the Statute.**

The present statute (Section 859 of Greater New York Charter) is a lineal descendant of an act passed on the 17th day of April, 1784, at the seventh session of the legislature in practically the same language. The preamble to that act was as follows:

"Whereas it hath been found by experience, that the wharfs fronting the East and Hudson Rivers in the City of New York, have conduced to the increase and advantage of trade and navigation to

and from the said City, in the lading and unloading of ships and other vessels: and for as much as the owners and proprietors thereof have been at a very great expense, not only in the making, erecting, and building, but also in maintaining and keeping the same from time to time in good and sufficient repair, to answer the purposes aforesaid. Be it therefore enacted, etc."

In the beginning and for nearly a century its application was restricted to Manhattan. It originated as a part of the general plan for developing the Manhattan waterfront, growing out of the fact that the City of New York held title to the land between high and low water mark and four hundred feet beyond low water mark and the upland owners had *no right* to erect wharves, but were compelled by law to do so and to maintain them for the use of the public. The purpose of the act is obvious. It was the grant of a franchise to collect wharfage from the public as compensation for a service rendered the public, and to encourage the development of the waterfront. This is clearly apparent from the preamble to the act.

In *Thompson v. The Mayor etc., of New York*, 11 N. Y. 115, 121, the Court said:

"The ground upon which the state allowed piers to be made upon the outside of South street was not that individuals might be benefited, but because the public required it. They gave the privilege to the proprietors of the adjoining lots in the first instance, not on the ground of any right in them, but in the exercise of a spirit of fairness and equity, and of a just liberality on the part of the sovereign authority towards the citizens."

Such preamble and act would be absurd if applied to land where the owner in fee had an existing right to build a store or wharf and collect any amount of rent or

wharfage he chose. Such application would result in disastrous effects and consequences.

#### 4.

#### **Effects and Consequences of the Statute.**

Construed as the grant of a special privilege or franchise to collect wharfage where no such right existed before, instead of a limitation upon an existing right, the act undoubtedly tended and still tends to accomplish its evident purpose of developing and keeping in proper repair the wharfage facilities in the City of New York. Construed as now contended for by the respondent it would have exactly the opposite effect. It would restrict the rights of private property and depreciate its value. It would give publicly owned wharves an unfair advantage over privately owned wharves. The wharves owned by the city are free from tax, while those that are privately owned are heavily taxed. Hence the city can do business at the statutory rates, but it does not follow for a moment that private owners can.

The construction now contended for by the respondent would thus make the penal feature of the law (Greater New York Charter, Section 863) exceedingly unjust and oppressive, if not unconstitutional. It would subject the owner of private property to treble damages for receiving what might be, and in this case has been found to be fair and reasonable value of its use.

#### 5.

#### **The Practical Construction Placed on this and Kindred Statutes.**

Through a long period of years these statutes have been construed as inapplicable to private wharves. The own-

ers of private wharves have habitually charged and received whatever rates they and their customers agreed upon. Even in the absence of an agreement, it cannot be disputed that they may recover the fair and reasonable value of the use of their property. (*Ex parte Easton*, 95 U. S. 68).

Section 859 of the city charter, providing for the rates of wharfage, is only one feature of the statutory regulation of wharves, piers, bulkheads and slips in the City of New York. There is no reason why it should be more applicable to the petitioner's pier No. 6 than other sections where the language is equally broad. Take, for example, Section 849, which provides:

"Whenever any pier, wharf, or bulkhead in The City of New York shall be incumbered or obstructed in its free use by merchandise, or any material not fixed to such pier, wharf, or bulkhead, the commissioner of docks is hereby authorized to require the owner, consignee or person in charge of such merchandise or material, to remove the same without any unnecessary delay \* \* \*."

This language, were it given the construction which the respondent attempts to impose on Section 859, would embrace the petitioner's pier, but it will not be contended that the commissioner of docks exercises or claims such authority as to it. There is no "free use" of a private pier. This section has the same parentage as Section 859, and was never intended to apply to any except public piers and is not so construed in practice. The same is true of Sections 851 and 852, where the language is equally broad and inclusive and which provides for the removal, and, if necessary, the sale of merchandise incumbering the "free use," of "any pier, or bulkhead or marginal street, wharf or place in The City of New York

\* \* \* without authority of law." Section 853 provides that the proceeds of the sale of such property, if not claimed in twelve months, shall be paid over to the Commissioners of the Sinking Fund.

The kindred Section 862 provides:

"It shall be lawful for the owners or lessees of any pier, wharf, or bulkhead within the City of New York, to charge and collect the sum of five cents per ton on all goods, merchandise, and materials remaining on the pier, wharf or bulkhead owned or leased by him, for every day after the expiration of twenty-four hours" (after their arrival).

Apparently only two efforts have been made to apply this statute to private wharves. The first was in *Woodruff v. Havemeyer*, 106 N. Y. 129, and the second was in *International Hide Co. v. New York Dock Co.*, 93 App. Div. 562. In each case the effort was unsuccessful. In the first case the Court intimates that the statute is applicable only to "*public* wharves in New York and Brooklyn," and could not be construed to "prohibit the owner of a *private* wharf" from making such contract as he pleased with his customer, nor could it be construed as requiring him to store goods for any period of time without compensation. Both of these cases are cited with approval by this Court in *The Allan Wilde* case.

The most recent practical construction placed on the statute under consideration (Section 859) is the resolution of the Commissioners of the Sinking Fund, establishing the rates pursuant to Chapter 477 of the Laws of 1923. This resolution which in terms applies to "any, pier, wharf, or bulkhead within said City" (of New York), provides that:

“Wharfage for vessels using the deck of the pier, accrues from the day the berth is reserved for the vessel as specified in the *application approved by the Department* until the expiration of the day of the last cargo is removed.” (Italics ours.)

The “Department” here referred to is, of course, the Department of Docks of the City of New York, to which application for approval is made only in the case of *public* wharves. It never occurs to any one to ask its permission to use a private pier such as is the petitioner’s pier No. 6.

It follows, therefore, that the statute under consideration was originally applicable only to Manhattan, where all of the wharves were *public*, and for nearly a century could not possibly have applied to any other kind. The only reason that might be assigned for contending that it now applies to petitioner’s wharves is that in 1860 (Laws 1860, Chapter 254) the Legislature amended the law so as to make it applicable to the then City of Brooklyn, and that upon the creation of Greater New York, the City of Brooklyn became a part of the City of New York and is governed by the Greater New York Charter.

But this reason is not sufficient. The extension of the statute to include Brooklyn was a territorial extension only. The words of the statute were otherwise the same and its character as the grant of a privilege or franchise remained unchanged. It never had applied to *private* wharves in the sense that the petitioner’s wharves are, and the extension of its territorial scope can certainly not have the effect of changing the settled meaning of its words. If there had been no wharves in Brooklyn except private wharves, as here defined, when that city was included in the terms of the act, there might be a semblance of support for the respondent’s contention;

but there *were* then public wharves or landing places there. See *People v. Lambier*, 5 Denio 9, and *Wetmore v. The Atlantic White Lead Co.*, *supra*.

Therefore, after the territorial extension of the statute to Brooklyn it became effective without being applicable to private wharves. The statute is still the grant of a privilege. It is applicable to those who can take under the grant. It is inapplicable to the petitioner, because, as the owner of private piers it already had all the rights the statute granted, and more, and it took nothing under the grant.

This difference between the property right in waterfront property on Manhattan and in Brooklyn has been recognized by the courts. It is referred to in *Wetmore v. Brooklyn Gas Light Co.*, *supra*.

In *Downes v. Elmira Bridge Co.*, 41 App. Div. 339, 340, referring to property of the Brooklyn Wharf and Warehouse Company on East River in the Borough of Brooklyn, in 1901 it is said:

"The wharf and the property adjacent were used in connection with piers for the purpose of unloading merchandise from vessels and the delivery of merchandise thereto for shipment. In normal condition this property, wharf and piers, was used by the general public for the purpose of the business usually carried on at such places. The property, however was *private*, and the *right* of the public therein was as licensees. (*Wetmore v. The Atlantic White Lead Co.*, 37 Barb. 70; *Wetmore v. The Brooklyn Gas Light Co.*, 42 N. Y. 384.) *In this respect the character of the public right is somewhat different from that which obtained in the City of New York, where the docks partake of the character of a public street.* (*Delaney v. Pennsylvania R. R. Co.*, 78 Hun, 393.)" (Italics ours.)



A very recent article by Winthrop Taylor, in *The Cornell Law Quarterly* (Vol. X, p. 303, April, 1925) on "*The Seashore and the People*," written with special reference to the tenure of shore property on Long Island, is in harmony with the above cases, and the difference between the tenure on Long Island and on Manhattan is pointed out (p. 321 note).

It therefore appears that the words, "Pier, wharf, or bulkhead," as used in the statute have acquired a well defined historical and judicial meaning; that nothing has transpired to change this meaning, and that this meaning restricts the statute to such wharves, piers, bulkheads and slips as are public in the sense that highways and streets are public. Such was the decision in *Murphy v. Voorhis*, *supra*.

#### POINT V.

**A wharf is public only when the public has the right to use it; use by license merely is not sufficient.**

The interpretation placed on this statute in *Murphy v. Voorhis*, *supra*, is undoubtedly correct. From the earliest times the statutory regulation of wharfage rates has been limited to *public* wharves; that is, wharves which the public has a *right* to use. In his treatise *De Portibus Maris* Lord HALE laid it down as the law that a man for his own private advantage might set up a wharf and take whatever rates his customers would pay, because he would be doing "no more than is lawful for any man to do, viz., make the most of his own"; but that "if the king or subject have a *public* wharf," the rates must be "reasonable and moderate." And he likened the interest

which the public has in such a wharf to the interest it has in a "street."

So in *Dutton v. Strong*, 66 U. S. 23, 32 (1 Black 23), the Supreme Court has said:

"Piers or landing places, and even wharves, may be private, or they may be in their nature public, although the property may be in an individual owner; or, in other words, the owner may have the right to the exclusive enjoyment of the structure and to exclude all other persons from its use; or he may be *under obligation* to concede to others the privilege of landing their goods, or of mooring their vessels there, upon the payment of a *reasonable* compensation as wharfage \* \* \*."

In *Louisville, etc., R. R. Co. v. West Coast Co.*, 198 U. S. 483, the necessity for the existence of the *right* on the part of the public to use a privately owned wharf so as to destroy its character as a private wharf is emphasized. The defendant erected a wharf at the foot of a public street in the City of Pensacola, and permitted sundry vessels not owned or operated by it to use such wharf but denied such permission to the plaintiff. Such denial of permission to use the wharf was upheld. The Court (p. 495) said:

"Neither the public nor the plaintiff had such an *interest* in the wharf as would give to either the *right to demand* its use on payment of reasonable hire."

And again the Court (p. 500) said:

"It has not devoted its wharf to the use of the public in so far as to thereby grant to every vessel the *right* to occupy its private property upon making compensation to the defendant for the exercise of such *right*."

In *Wetmore v. Brooklyn Gas Light Co.*, 42 N. Y. 384 the plaintiff sued for damages for being excluded from the use of a pier in Brooklyn. Recovery was denied because the wharf was private and the plaintiff had no "right to fasten his vessel" to it and "unload the cargo thereon," and because the public had no "right to its use." To the same effect is *Wetmore v. Atlantic White Lead Co.*, 37 Barb. 70.

The case of *People v. B. & O. R. R. Co.*, 117 N. Y. 150, involved a certain pier in Manhattan, which the public formerly had the right to use as a street without let or hindrance. Under authority from the legislature the defendant had placed a shed upon this pier, so that it could not be used by the public, but only by such persons as it might license. The effect was to deprive the public of the right to use it, and the Court held that the permission to shed the pier amounted to "turning the public pier into a private one."

Mere license is not sufficient. There must be a *jus publicum*. Permission by the owner for one or many other persons to use a private wharf does not confer any right on the public and does not convert the wharf into a public wharf.

In *Weems Steamboat Co. v. People's Co.*, 214 U. S. 345, 356, the Court said:

"The owner of a private wharf on a navigable stream does not, on that account only, hold it by a different title from the owner of any other property which he may use himself or permit others whom he may select to use, while at the same time denying its use by any one else."

The Court added (p. 357):

"The public can obtain no adverse right as against such owner by mere user. To obtain it there must

be an intention on the part of the owner to dedicate the property to the use of the public, and there must be an acceptance of such dedication on the part of some public authority, which may sometimes be implied (but not in such a case as this), and in the absence of such dedication and acceptance the use will be regarded as under a simple license, subject to withdrawal at the pleasure of the owner."

And this is so although the use by the public has continued for more than twenty years.

*Pearsall v. Post*, 20 Wend. 111, aff'd 22 Wend. 425;

*O'Neill v. Annett*, 27 N. J. L. 290.

In *Bogert v. Haight*, 20 Barb. 251, the plaintiff was the owner of a dock and storehouse at Dresden, on Seneca Lake, used for steamboat landing and other purposes. He sued the defendant for damages for coming on the dock after having been forbidden to do so and recovered damages. The Court said:

"His employment, however, was a merely private one; he was under no *legal obligation* to allow the use of his wharf or warehouse to every person applying, even if he had suitable accommodations, and a reasonable reward was offered him; but he might limit the general license, or terminate it, in the case of any particular persons, by giving them notice not to come upon the premises."

## POINT VI.

### Summary and Conclusion.

From the foregoing it follows that the sole reason and purpose of the statutory regulation of the rates of wharf-

age in the City of New York is to compensate the owners of *public* wharves for the *right* of the public to use them; that the public right to regulate and the public right to use are inseparable, and that when the public right to use is absent the public right to regulate has not been asserted. No *right* on the part of the public to use the petitioner's pier No. 6 has been shown and none exists. Since the reason for the application of the statute is absent, the statute is inapplicable.

**Section 859 of the Greater New York Charter is not a bar to the recovery by the petitioner of the just and reasonable value of the use of its Pier No. 6 by the Steamship "Poznan."**

JOSEPH S. AUERBACH,

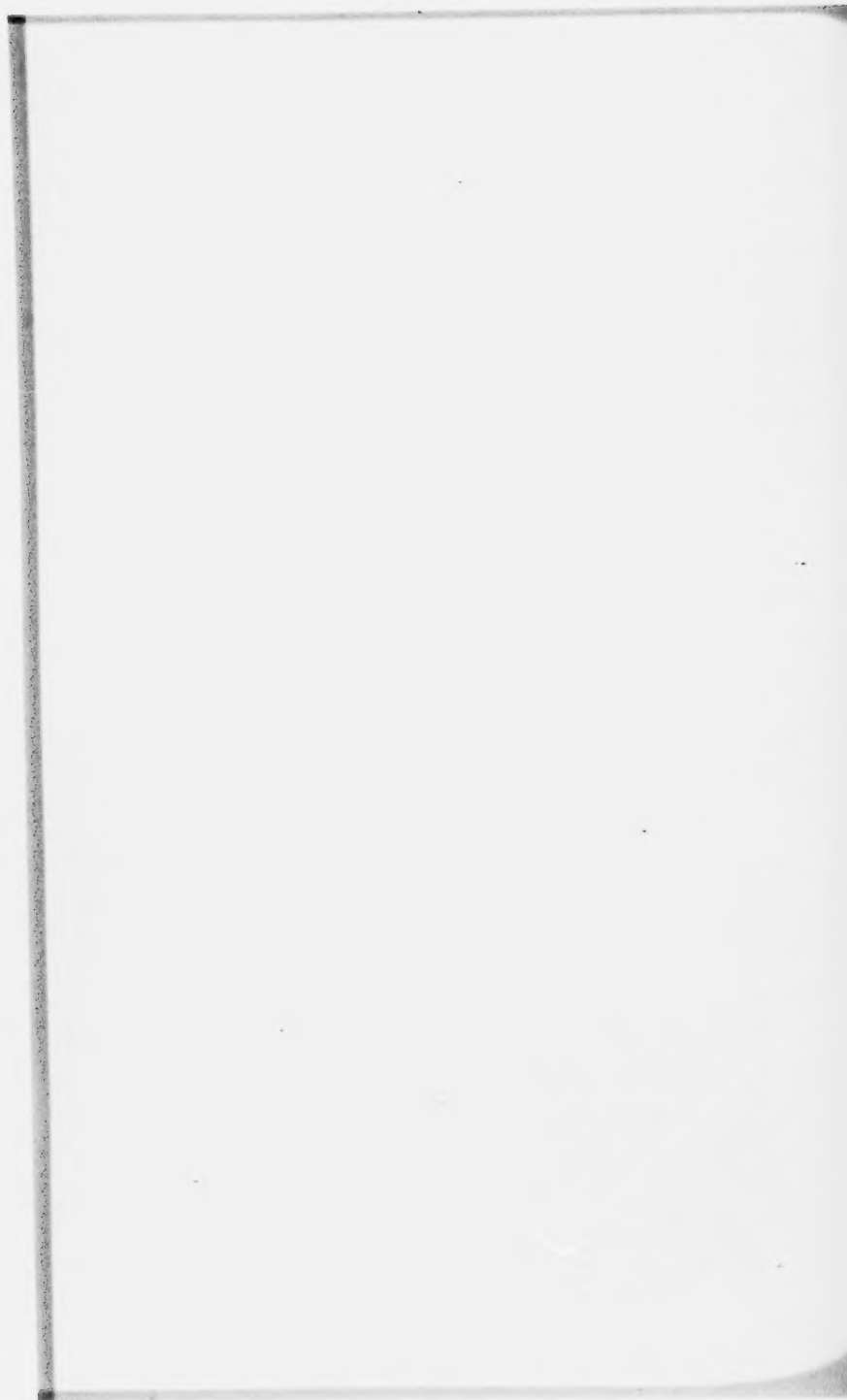
CHARLES E. HOTCHKISS,

CHARLES H. TUTTLE,

ALEXANDER J. FEILD,

Counsel for the Petitioner.





Office Supreme Court, U. S.  
**FILED**

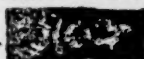
**OCT 30 1925**

WM. R. STANSBURY  
CLERK

IN THE  
**Supreme Court of the United States,**

OCTOBER TERM—1925.

No.



**229**

NEW YORK DOCK COMPANY,

*Petitioner,*

—against—

STEAMSHIP "POZNAN," her engines, etc., and JOHN  
B. HARRIS COMPANY,

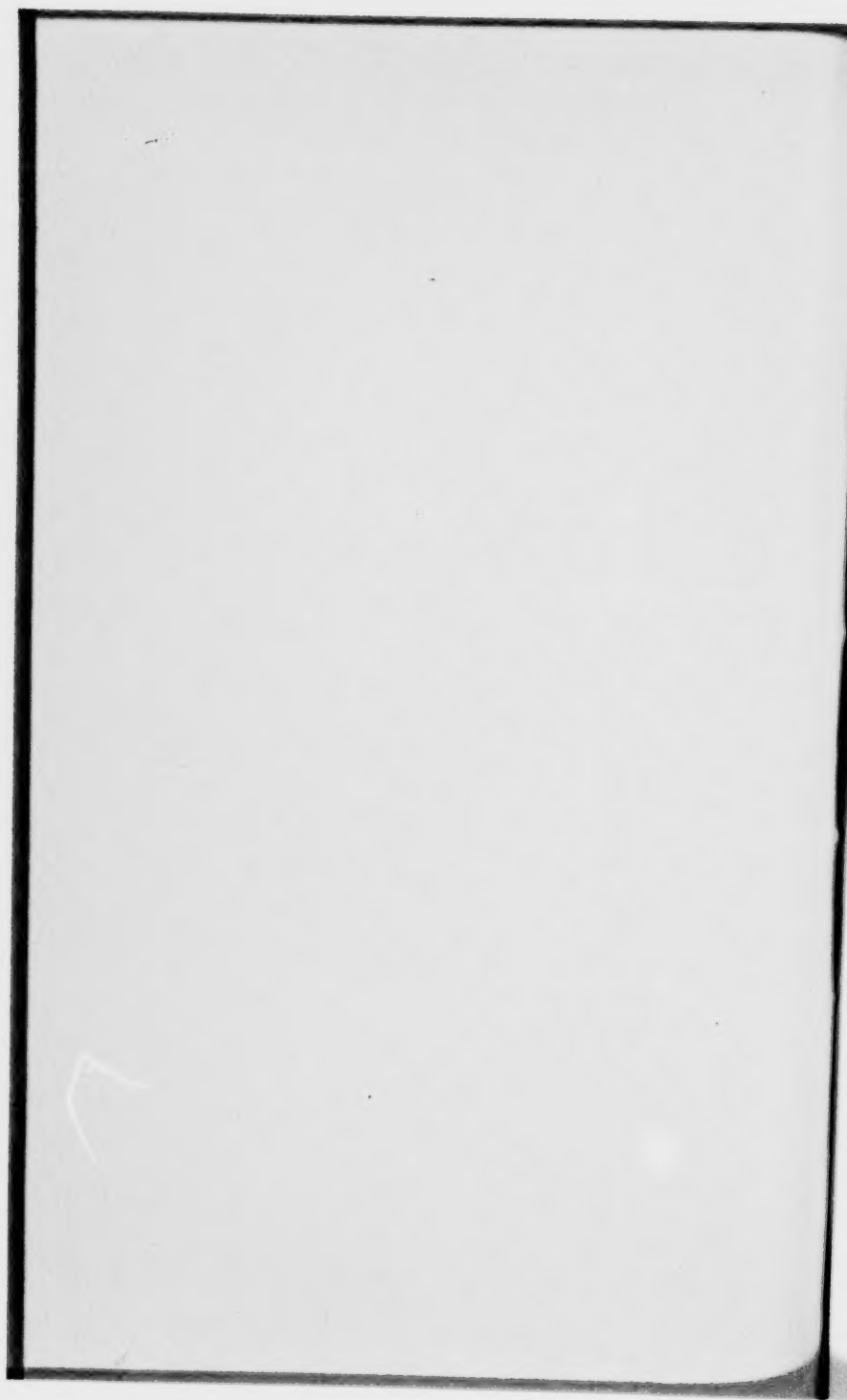
*Respondent.*

**BRIEF IN OPPOSITION TO WRIT OF CERTI-  
ORARI TO THE CIRCUIT COURT OF  
APPEALS FOR THE SECOND CIRCUIT.**

HUNT, HILL & BETTS,  
*Proctors for Respondent.*

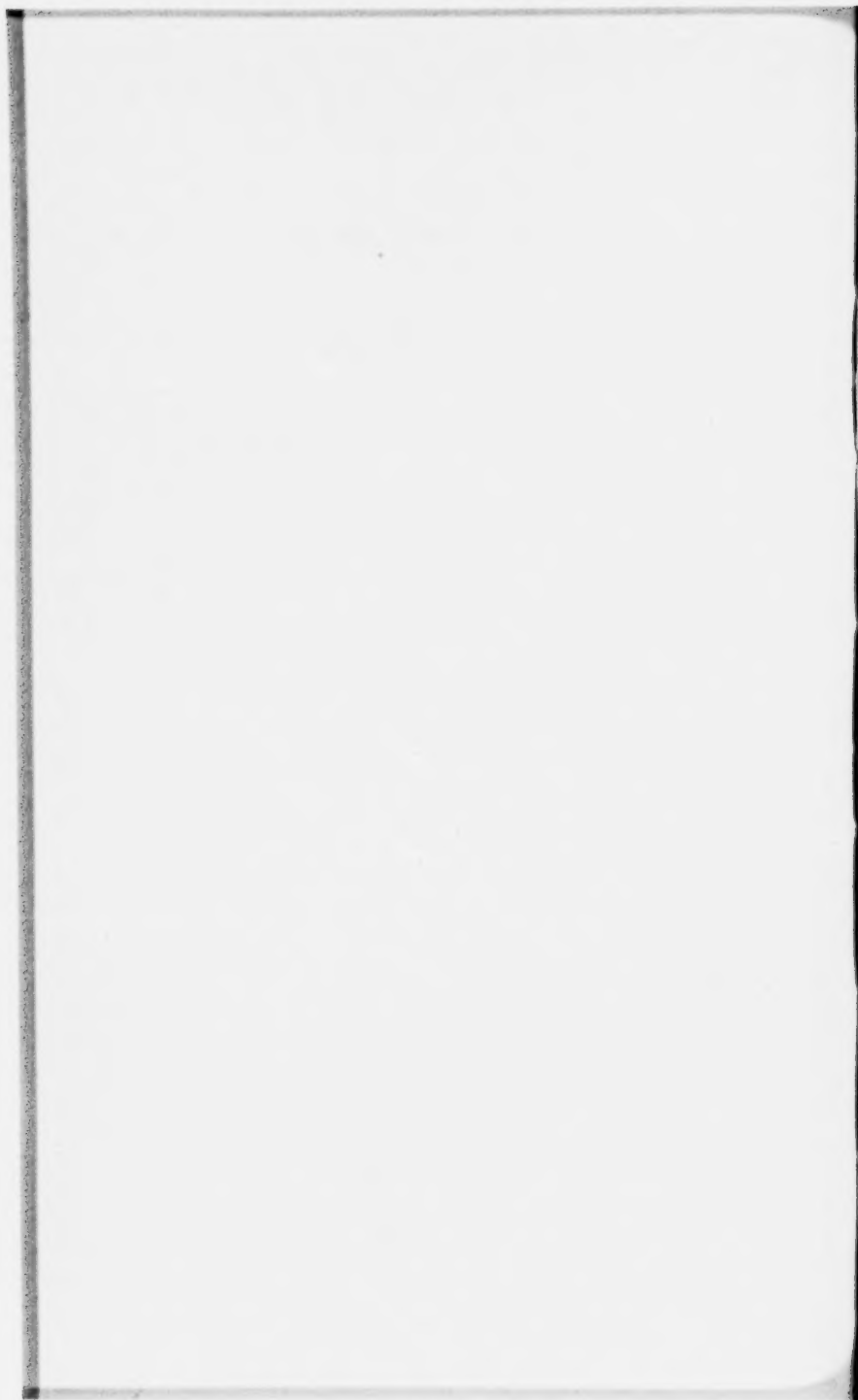
GEO. WHITEFIELD BETTS, JR.,  
MARK W. MACLAY,  
EDNA F. RAPALLO,  
*Of Counsel.*





## SUBJECT INDEX.

|   | PAGE |
|---|------|
| Reference to opinions below .....                 | 1    |
| Statement .....                                   | 1    |
| Facts .....                                       | 2    |
| Decision of District Court .....                  | 5    |
| Decision of Circuit Court of Appeals .....        | 5    |
| Questions presented .....                         | 6    |
| POINT I—Question as to whether maritime lien ex-  |      |
| isted no ground for review .....                  | 7    |
| (a) Not a question of law .....                   | 7    |
| (b) Errors in petitioner's brief .....            | 7    |
| (c) Court below denied maritime lien for rea-     |      |
| son other than that given by petitioner....       | 8    |
| (d) No court order permitting use of peti-        |      |
| tioner's dock .....                               | 9    |
| (e) No objection by respondent to moving          |      |
| vessel .....                                      | 9    |
| POINT II—Question of whether an equitable lien    |      |
| existed on maritime lien of the lienors no ground |      |
| for review .....                                  | 10   |
| POINT III—No equity in petitioner's position..... |      |
| Conclusion .....                                  | 12   |



IN THE  
**Supreme Court of the United States,**  
OCTOBER TERM—1925.

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NEW YORK DOCK COMPANY,

*Petitioner,*

—against—

S. S. "POZNAN," her engines, etc., and JOHN B. HARRIS  
COMPANY,

*Respondent.*

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**BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI.**

The opinion of the District Court for the Southern District of New York (L. Hand) (R., 55-59) awarding a decree to the libellant is reported in 297 Fed. Rep. 345, and a supplemental opinion was subsequently made (R., 59, 60), which is not reported. The unanimous decision of the Circuit Court of Appeals (Rogers, Hough & Manton, *J.J.*) reversing the decree of the District Court and dismissing the libel, has not yet been officially reported, but may be found in 1925 A. M. C. 1289. It will also be found on pages 194 to 227 of the record.

***Statement.***

The case is of importance only to the parties. The decision of the Circuit Court of Appeals is not in conflict with a decision of another Circuit Court of Appeals on the same matter; is not in respect of an important ques-

tion of federal law, which should be settled by this Court; is not in conflict with applicable decisions of this Court; and has not so departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The case does not fairly fall within any of the categories of paragraph 5 of Rule 35 of the Supreme Court of the United States, revised July 1, 1925.

### ***Facts.***

Most of the important facts in this case were stipulated by counsel and appear in the record at pp. 13 to 35. It is submitted that the following quotations from the record present the case more accurately than the inferences therefrom set forth in the petitioner's brief:

"On or about November 30, 1920, the New York Dock Company and Polish-American Navigation Corporation (owner of the *S. S. Poznan*) \* \* \* entered into an agreement for the use of said Pier No. 6 by the said *S. S. Poznan* \* \* \* charge to commence from 7 A. M. December 1, 1920 and to continue up to the time the steamer left and/or all cargo was removed and agreeing to pay in addition thereto for lights \* \* \* for cleaning pier \* \* \* and for carting dirt \* \* \*" (R., 14).

#### **The *S. S. Poznan***

"was made fast to said Pier No. 6 during the afternoon of December 2, 1920, under and pursuant to said agreement. Thereafter on December 2, 1920, said vessel was arrested and taken into possession by the United States Marshal \* \* \*" (R., 14-15).

The vessel was arrested in a suit afterwards consolidated with others into one cause consisting of

"suits for non-delivery of cargo shipped from New York and carried by the ship to Havana and back to New York without being discharged until the ship returned and unloaded the cargo in New York. This action was against the ship *in rem* and against the Acme Operating Corporation, charterer of the ship, and the Polish American Navigation Corporation, the owner of the ship *in personam*, and an interlocutory decree entered against all three" (R., 16).

"Said vessel was continuously in the custody of the Marshal from the time he took possession of it until it left said pier on March 11, 1921" (R., 16).

"Thereafter \* \* \* New York Dock Company rendered its bill to Polish Navigation Corporation in the sum of \* \* \* \$26,462.03" (R., 15).

"On said indebtedness Polish American Navigation Corporation paid New York Dock Company \* \* \* \$9,500, leaving a balance of principal unpaid amounting to \$16,962.03" (R., 15, 16).

"On or about December 9, 1921, the New York Dock Company and the Polish American Navigation Corporation entered into the agreement set forth in the two letters, copies of which are hereto annexed \* \* \* marked Exhibits B and B-1, and the first payment of \$500 was made on December 16th, 1921 \* \* \*" (R., 20).

The letters referred to—Exhibits B and B-1 (R., 27, 28), show an agreement for a compromise settlement.

On January 5th, 1921, Judge Augustus N. Hand signed on application of Acme Operating Corporation, the charterer, an order directing the Polish American Navigation Corporation, the owner, and all intervening libellants to

"show cause \* \* \* why an order should not be entered herein directing the Polish American Navigation Corporation to move on the 6th day of January, 1921, after working hours of that day the S. S. *Poznan* from Pier 6, Brooklyn, N. Y., where the said steamship is now laying, to another pier whereat the said steamship *Poznan* can properly and expeditiously discharge and further directing said Polish American Navigation Corporation to employ twelve gangs of stevedores in unloading said steamship" (R., 42).

On January 5th, 1921, Judge Augustus N. Hand signed an order appearing in the Record as Exhibit H (R., 54, 55), which recites that after hearing proctors for various intervening shippers and

"after hearing members of the shippers' committee in person and the members of the shippers' committee having requested the proctors for the Polish American Navigation Corporation and Acme Operating Corporation to suspend discharging the vessel for one week in order to enable the merchandise to be properly separated on the dock and the dock cleared for further discharging of the vessel and the Acme Operating Corp., the charterer, Polish American Navigation Corporation having acquiesced in said request, it is ordered that the motion of the Acme Operating Corporation be denied with leave to renew in eight days."

### ***Decision of the District Court.***

The District Court held (1) that the maritime lien for wharfage "arose *de die in diem* and ceased on December 2, if it ever began at all" (R., 57) (the vessel was arrested by the Marshal December 2nd); (2) but that nevertheless

"the libellant, which furnished the wharf, has an equitable claim on the fund though not a maritime lien on the ship, and in priority to the lienors to protect whose liens the service was rendered" (R., 57).

or, as put in the District Judge's supplemental opinion,

"the lien here established was an equitable lien against the lienor's own rights in the vessel arising after she was in custody. It was a lien on their liens \* \* \*" (R., 59).

### ***Decision of the Circuit Court of Appeals.***

The opinion of the Circuit Court of Appeals contains (1) a discussion of whether a maritime lien can arise when the vessel is in the custody of the Marshal (2) a discussion of whether or not a maritime lien for wharfage arises when the contract is made by the owner and not by the master of the vessel and the effect of the Merchant Marine Act of 1920. No decision on this point is announced, the Court stating

"As it is not important in the view which we take of the case, we express no opinion concerning it at this time" (R., 218).



(3) The following holding and finding:

"It is enough for the present purpose that no lien attached while the ship was in *custodia legis*, which was practically the entire period for which the bill was rendered" (R., 218, 219).

(4) A negative answer to the following question:

"Is the libellant nevertheless entitled to an equitable lien, and if so, one which is entitled to priority over the liens of the libellants in the consolidated suit" (R., 219).

### ***Questions Presented.***

The only questions to be presented to this Court for review, therefore, are (1) Did a maritime lien arise while the vessel was in the custody of the Marshal, and (2) If no maritime lien arose, was there nevertheless an equitable lien on the maritime lien of the consolidated libellants which would require a Court of Admiralty to decree to the New York Dock Company prior payment from the proceeds of the vessel in the registry of the Court.

On page 3 of the petition the petitioner sets forth the questions which it claims are presented upon this record. Of these neither 1 nor 2 were decided by or even presented to either the District Court or the Circuit Court of Appeals and are entirely unnecessary to support the decisions of either of those Courts. Both questions 3 and 4 involve questions of fact which were decided adversely to the petitioner by the District Court and the Circuit Court of Appeals. No question of public importance was

presented. The only matter which it is claimed in the petition (p. 5) is one of public importance is as to whether a maritime lien for wharfage exists unless expressly waived, which question is not at issue in this case and which the Circuit Court of Appeals expressly declined to pass on, stating (R., 218) :

"The question whether wharfage is a 'necessary' within the meaning of the Act of 1920 was not argued when this case was heard. As it is not important in the view which we take of the case we express no opinion concerning it at this time."

## POINT I.

### **Question as to whether maritime lien existed no ground for review.**

(a) Not a question of law.

There is no conflict whatsoever in the decisions of the various Circuit Courts of Appeals to the effect that where wharfage is furnished to a vessel which is in the custody of the law and therefore such services do not tend to facilitate its use as an instrument of commerce, no maritime lien arises. If this point has not been decided by this Court, the reason doubtless is that there has been no question as to the principle involved and the only difference in the various decisions has been its application to the particular state of facts.

(b) Errors in petitioner's brief.

On page 8 of the Petition and Brief appears the statement that the vessel was not arrested until wharfage

"for one or two days had accrued under the contract." It is true that under the contract with the owner wharfage was to commence at 7 A. M. on December 1st, but no lien for wharfage could possibly arise until the vessel arrived at the dock, which was not until December 2nd, or the same day she was taken into custody by the Marshal. Petitioner omits to mention that it was paid the sum of \$9,500 which was far in excess of the price of one or two days' wharfage. Thus, even though it be admitted that the lien for such wharfage arose prior to the arrest and survived the arrest, the complete answer is that such lien was fully paid. Of course the lien only arose *de die in diem* as said by the District Judge, and would not continue to increase from day to day after the vessel was in the Marshal's custody simply because it had a valid inception. The wharfage by the contract was only payable by the day (R., 14) and the contract was not for any definite period.

(c) Court below denied maritime lien for reason other than that given by petitioner.

The petitioner has attempted to make it appear that the reason that the Circuit Court of Appeals denied it a maritime lien was because the credit of the vessel was not expressly pledged. In support of this contention, petitioner at pages 9, 10, 14, 16 and 18 of its brief quotes certain excerpts from the opinion of the Circuit Court of Appeals. The excerpts quoted on pages 9, 14, 16 and 18 of the brief refer to cases decided before the passage of the Merchant Marine Act of 1920, are couched in the past tense and do not purport to be decisive here, since the Court proceeds to consider whether the provisions of that act have not changed the previous law. The last

excerpt on page 9 and those on page 10, as is perfectly clear from the opinion, do not refer to the maritime lien claimed by petitioner, but are made only in connection with the so-called equitable lien allowed by the District Court. The opinion of the Circuit Court of Appeals is divided distinctly into two parts, the first part dealing with the maritime lien, and the second part with the equitable lien, and these statements are contained in the second part of the opinion. As the Circuit Court of Appeals in this second part of the opinion was engaged in a consideration of whether the inherent equities supported petitioner's position, it was only in this connection that that Court considered whether or not there had been a pledging of the credit of the vessel.

(d) No Court order permitting use of petitioner's dock.

Petitioner makes a further effort to sustain its claim to a maritime lien by striving to make it appear that the *Poznan* remained at petitioner's dock under order of the District Court (Petition and Brief, p. 2) :

The only order to which petitioner can possibly refer is the order (R., 23-26) by which various shippers, many of whom were not among the consolidated libellants, were permitted to re-take their cargo upon fulfilling certain conditions as to the filing of bonds conditioned for the payment of any freight due, etc., and makes no mention whatsoever of petitioner's wharf, or of where or how the cargo was to be discharged. Indeed, if it wished, petitioner could have collected wharfage from such shippers. This order was not even in one of the consolidated libels but was in a libel for possession by a shipper.

(c) No objection by respondent to moving vessel.

The petitioner further makes frequent references to the fact that the libellants had objected to the removal of the vessel from petitioner's wharf. There is nothing whatsoever in the record to show that the respondent herein was one of the objecting libellants, or that any of the libellants objected, except those whose particular shipments were divided, part having been discharged and part still remaining on the vessel. These did not wish the vessel moved until all of their cargo was discharged. Those whose shipments were already on the dock, naturally, had no interest in the matter, and those whose shipments were on the vessel were rather inclined to have the ship moved to some other dock where the discharge could be expedited. The petitioner omits to mention that the application for moving the vessel was not made by it, but by the Acme Operating Corporation; that petitioner was not a party to the application; that although the order denying the application expressly gave leave to renew in eight days, no one, including the petitioner, saw fit to press it.

## POINT II.

**Question of whether an equitable lien existed on the maritime lien of the lienors no ground for review.**

There is no conflict of decisions upon this point, undoubtedly because such an amazing theory has never before been suggested. As the Circuit Court of Appeals said (R., 219) :

"We confess that at first blush, the suggestion strikes us with surprise. That while the wharf

owner has no maritime lien during the period the ship was in *custodia legis*, he, nevertheless, has an equitable lien, and that such lien is entitled to priority over the maritime lien of the shippers."

And again (R., 226) :

"No decision asserting any such doctrine is known to us. We think it unsupported by authority and contrary to principle. The effect of creating an equitable lien and giving it priority over the maritime lien is in plain language an attempt to extend the maritime lien by construction by not calling it a maritime but an equitable lien."

Petitioner deals with this question in the fourth point of its brief, and for obvious reasons cites no authority in support of its argument.

### POINT III.

#### **No equity in petitioner's position.**

There is no controlling equity in the petitioner's situation. Its hardships, if any, were of its own creation. It first hired its pier to an irresponsible owner, it then permitted various shippers, who had no connection with the consolidated libel to remove their goods without paying any wharfage, it next let its bill run indefinitely, without taking any steps for a long time to collect it, and without even notifying the consolidated libellants of its unpaid charges, so far as the record shows, and it now contends that this Court should hear its claim to charge the consolidated libellants with the whole wharfage for the goods of all the shippers, including those who did not join the consolidated libel.

### **CONCLUSION.**

This case presents only two possible points for review, since these were the only points necessary to the decision in the Court below, or which were actually decided by it.

The first of these points, as to the existence of a maritime lien, was decided by the Court below in accordance with well settled principles, there being no conflict in the decisions on the law governing, and the only question being as to the application of that law to the specific facts of the instant case.

The second of these points, as to the existence of some kind of equitable lien on the maritime liens of the lienors, was decided by the Circuit Court of Appeals in accordance with firmly established principles, there being no authority which could conceivably support a contrary view, and is not of sufficient importance to be reviewed by this Court. The petitioner cannot ask for a review of questions not decided by the Courts below, and the questions actually decided being questions of general law, not decided in a way probably untenable or in conflict with the weight of authority, do not warrant review by this Court and therefore the petition should be denied.

Dated, New York, October 28, 1925.

Respectfully submitted,

GEO. WHITEFIELD BETTS, JR.,  
MARK W. MACLAY,  
EDNA F. RAPALLO,

*Of Counsel.*

Office Supreme Court, U. S.

**F I L E D**

**MAR 11 1927**

**WM. R. STANSBURY**  
**CLERK**

**Supreme Court of the United States,**

OCTOBER TERM—1926.

**No. 229.**

**NEW YORK DOCK COMPANY,**

*Petitioner,*

—against—

Steamship "POZNAN", her engines, etc., and

**JOHN B. HARRIS COMPANY,**

*Respondent.*

**BRIEF FOR RESPONDENT.**

**On Writ of Certiorari to the United States Circuit  
Court of Appeals for the Second Circuit.**

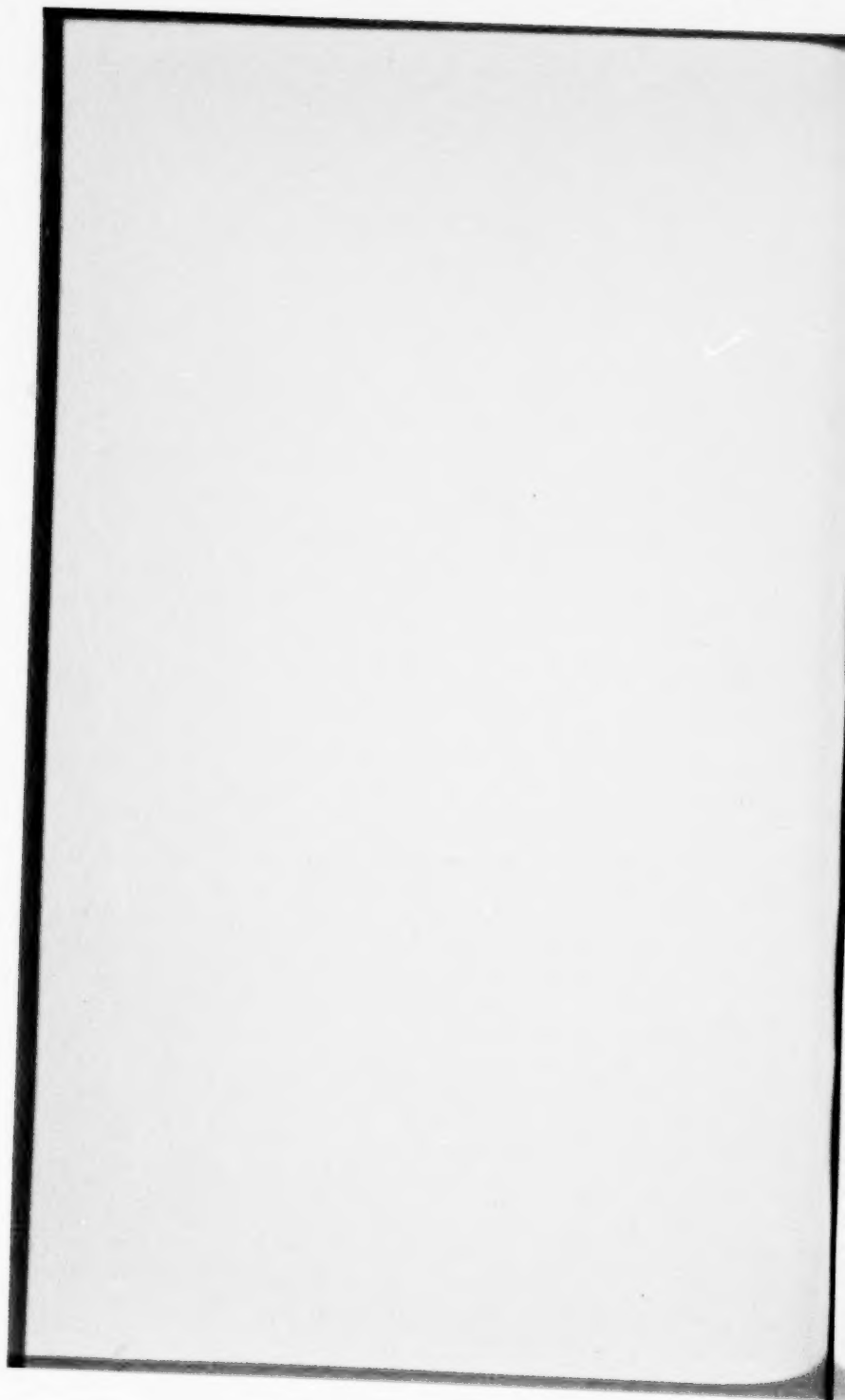
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**MARK W. MACLAY,**

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## SUBJECT INDEX.

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|  | PAGE |
|--|------|
| REPORTS OF OPINIONS BELOW.....   | 1    |
| JURISDICTION OF THIS COURT.....  | 1    |
| STATEMENT OF THE CASE.....   | 2    |
| <br>POINT I—BOTH LOWER COURTS PROPERLY HELD<br>THAT NO MARITIME LIEN FOR THE WHARFAGE, LIGHT-<br>ING AND CLEANING EXISTED AGAINST THE VESSEL OR<br>HER PROCEEDS BECAUSE OF THE FACT THAT THE<br>VESSEL WAS, DURING THE TIME IN QUESTION, IN<br><i>custodia legis</i> ..... | 10   |
| A. <i>Reasons for the rule</i> .....   | 10   |
| B. <i>The authorities hold with remarkable unani-<br/>mity that there could be no maritime lien<br/>under the circumstances at bar</i> .....   | 13   |
| C. <i>A maritime lien arises only as and when<br/>the services are rendered</i> .....  | 28   |
| D. <i>The wharfage did not accrue upon the order<br/>of the Court or upon the consent of the re-<br/>spondent</i> .....  | 31   |
| <br>POINT II—PETITIONER'S CLAIM OF A LIEN FOR<br>WHARFAGE FURNISHED THE <i>Poznan</i> WHILE SHE WAS<br>IN <i>custodia legis</i> AS AN EXPENSE OF JUSTICE IS NOT<br>SUSTAINED BY THE FACTS OR BY THE AUTHORITIES..  | 36   |
| A. <i>Petitioner's services were not rendered for<br/>the preservation of res</i> .....  | 36   |

|   | PAGE |
|---|------|
| B. <i>Petitioner's cases do not support its conclusion</i> .....  | 37   |
| C. <i>Petitioner's claim of \$16,962.03 for wharfage, cleaning and dirt removal was properly stricken from the Marshal's bill of costs and fees</i> ..... | 46   |
| POINT III—HAVING NO MARITIME LIEN, PETITIONER CANNOT RECOVER IN THIS ACTION ON ANY OTHER THEORY .....   | 50   |
| A. <i>The equitable relief sought is not within admiralty jurisdiction</i> .....  | 50   |
| 1. A non-maritime claim cannot be charged against the general proceeds but only against the remnants and surplus.....                                     | 50   |
| 2. The proceeds of a vessel may be distributed only to those having specific liens thereon .....  | 51   |
| 3. Services rendered to the lienors or to their property do not give rise to a lien or charge on the proceeds of sale.....                                | 51   |
| 4. There is no jurisdiction in admiralty to enforce a right which is purely equitable and does not give rise to a maritime lien                           | 52   |
| B. <i>No equity existed in favor of the petitioner as the respondent was not unjustly enriched at its expense</i> .....                                   | 52   |
| C. <i>The petitioner has already been paid the reasonable value to the Poznan of the berthing of the vessel</i> .....                                     | 54   |

|  | PAGE |
|--|------|
| D. <i>Petitioner's claim that respondent is ex-<br/>topped from claiming proceeds as against it<br/>is unsound</i> .....                             | 58   |
| <b>POINT IV—A LIEN FOR WHARFAGE FURNISHED ON<br/>THE ORDER OF THE OWNER DOES NOT ARISE IN THE<br/>ABSENCE OF AN EXPRESS AGREEMENT TO GIVE A LIEN</b> | 59   |
| A. <i>The Court below properly did not decide<br/>whether wharfage is a "necessary" under the<br/>Act of 1920</i> .....                              | 59   |
| B. <i>The status of wharfage furnished on the<br/>order of the owner before the Lien Act of<br/>1910</i> .....                                       | 61   |
| C. <i>The status of wharfage furnished on the<br/>order of the owner under the Lien Acts of<br/>1910 and 1920</i> .....                              | 66   |
| <b>POINT V—THE DECISION OF THE UNITED STATES<br/>CIRCUIT COURT OF APPEALS FOR THE SECOND CIR-<br/>CUIT SHOULD BE AFFIRMED, WITH COSTS</b> .....      | 74   |
| <b>APPENDIX A—ACT JUNE 23, 1910</b> .....  | 75   |
| <b>APPENDIX B—SHIP MORTGAGE ACT, 1920</b> .....  | 77   |
| <b>APPENDIX C—GREATER NEW YORK CHARTER §859</b>  | 80   |

## INDEX OF AUTHORITIES CITED

|  | PAGE           |
|--|----------------|
| <i>Ada, The</i> , 250 Fed. 194.....                                      | 51, 52         |
| <i>Advance, The</i> , 60 Fed. 766; affirmed 71 Fed. 987...               | 62             |
| <i>Albert Schultz, The</i> , 12 Fed. 156.....                            | 52             |
| <i>Allan Wilde, The</i> , 255 Fed. 171, 264 Fed. 291.....                | 56             |
| <i>Allegheny, The</i> , 85 Fed. 463.....                                 | 45             |
| <i>America, The</i> , 2 West. Law Month. 279; Fed. Cas.<br>288 .....     | 44             |
| <i>Andrew J. Smith, The</i> , 263 Fed. 1004.....                         | 22, 68         |
| <i>Antonio Zambrana, The</i> , 88 Fed. 546.....                          | 56             |
| <i>Astoria, The</i> , 281 Fed. 619.....                                  | 18, 25, 26, 30 |
| <i>Atlantic City, The</i> , 220 Fed. 281.....                            | 51             |
| <i>Atlantic Transport Co. v. Imbrovek</i> , 234 U. S. 52...              | 23             |
| <i>Augustine Kobbe, The</i> , 37 Fed. 696; 37 Fed. 702<br>15, 16, 24, 25 |                |
| <i>Balize, The</i> , 52 Fed. 414.....                                    | 51             |
| <i>Beard v. Marine Lighterage Corporation</i> , 296 Fed.<br>146 .....    | 56, 57         |
| <i>Benedict, Admiralty</i> , 5th Ed., Sec. 453.....                      | 51             |
| <i>Bethlehem, The</i> , 286 Fed. 400.....                                | 31             |
| <i>Bethulia, The</i> , 200 Fed. 876.....                                 | 17, 25         |
| <i>Canter v. The American Ins. Co.</i> , 3 Peters 307.....               | 49             |
| <i>Cimbria, The</i> , 214 Fed. 131.....                                  | 63             |
| <i>Clarence B. Mitchell, The</i> , 1926 A. M. C. 1584.....               | 20-21          |
| <i>Coamack, The</i> , 8 Fed. (2d) 151.....                               | 19-20, 30      |
| <i>Culgoa, The</i> , 8 Fed. (2d) 62.....                                 | 19             |
| <i>C. Vanderbilt, The</i> , 86 Fed. 785.....                             | 22             |
| <i>C. W. Moore, The</i> , 107 Fed. 957.....                              | 63             |

|   | PAGE       |
|---|------------|
| <i>Davis v. Child</i> , 2 Ware 78, Fed. Cas. 3628.....  | 52         |
| <i>Dowling v. McKeuncy</i> , 124 Mass. 478.....   | 54         |
| <i>Ex parte Easton</i> , 95 U. S. 68.....   | 64-65, 72  |
| <i>Edith, The</i> , 94 U. S. 518.....   | 51         |
| <i>Erinagh, The</i> , 7 Fed. 231.....   | 24-25      |
| <i>Estaban de Antunano, The</i> , 31 Fed. 920<br>13-14, 15, 21, 22, 25  |            |
| <i>Eurana, The</i> , 1 Fed. (2d) 684.....   | 52         |
| Federal Maritime Lien Act, <i>The</i> , 37 Harv. Law Rev.<br>15 .....   | 73         |
| <i>F. Meywin, The</i> , 10 Ben. 403, Fed. Cas. 4893.....  | 45         |
| <i>Fortuna, The</i> , 206 Fed. 573.....   | 22         |
| <i>Free Trader, The</i> , 1 Brown, Adm. 73; Fed. Cas. 5091  | 45         |
| <i>Gazzam v. Simpson</i> , 114 Fed. 71.....   | 54         |
| <i>Geisha, The</i> , 200 Fed. 865.....  | 17, 23     |
| <i>Grapeshot, The</i> , 22 Fed. 123.....  | 14-15      |
| Greater New York Charter, Sec. 859, Laws of State<br>of New York 1901, Ch. 466.....                                 | 80         |
| <i>Hatteras, The</i> , 255 Fed. 518.....  | 68, 69, 71 |
| <i>Henderson v. Banker</i> , 58 N. J. L. 26.....  | 54         |
| <i>Henry S. Grove, The</i> , 285 Fed. 60.....   | 69, 73     |
| <i>Hill v. The Amelia</i> , 6 Ben. 475, Fed. Cas. No. 6487;<br>affirmed 23 Fed. 406.....                            | 52         |
| House Committee Reports, 66th Congress, Second<br>Session, Dec. 1, 1919-June 5, 1920, Nos. 1093,<br>1102, 1107..... | 70         |
| <i>International Steredoring Company v. Harecty</i> , 272<br>U. S. , 71 L. Ed. 22, 1926 A. M. C. 1638..             | 23         |
| <i>Iragas, The</i> , 283 Fed. 445.....  | 31         |

|  | PAGE       |
|--|------------|
| <i>J. Ducretty, The</i> , 207 Fed. 997.....  | 68, 69, 71 |
| <i>Jeanette, The</i> , 9 Fed. (2d) 408.....  | 20         |
| <i>John E. Mulford, The</i> , 18 Fed. 455.....   | 47         |
| <i>Kalorama, The</i> , 10 Wall. 204.....   | 62, 63-64  |
| <i>Kellam v. Emerson</i> , 72 Curt. 79, Fed. Cas. No. 7669.....                        | 32         |
| <i>Keener, Quasi Contracts</i> , p. 279.....   | 54         |
| <i>Kjore v. Etlee</i> , 222 Fed. 243, 137 C. C. A. 659.....                            | 21         |
| <i>Little Charles, The</i> , 1 Brock. 347; Fed. Cas. No. 15612.....                    | 65         |
| <i>Littawanna, The</i> , 21 Wall. 558.....   | 51         |
| <i>Lydia A. Harrey, The</i> , 84 Fed. 1000.....  | 51         |
| <i>Mary K. Campbell, The</i> , 31 Fed. 840.....  | 22         |
| <i>Matthews v. Davis</i> , 6 Humpf. 324.....   | 54         |
| <i>Miller v. The Peerless</i> , 45 Fed. 491.....                                       | 51         |
| <i>M. L. C. 10, The</i> , 10 Fed. (2d) 699.....  | 56         |
| <i>Maskogon, The</i> , 275 Fed. 117; 275 Fed. 348.....                                 | 68         |
| <i>Neptune, The</i> , 277 Fed. 230.....  | 52         |
| <i>New Bedford Dry Dock Co. v. Purdy</i> , 258 U. S. 96..                              | 71         |
| <i>New York Dock Co. v. SS. Puznan</i> , 207 Fed. 345;<br>9 Fed. (2d) 838.....         | 1, 19      |
| <i>Nissequague, The</i> , 280 Fed. 174.....  | 17-18      |
| <i>Norelty, The</i> , 9 Ben. 195; Fed. Cas. 10368.....                                 | 46         |
| <i>Oreania, The</i> , 244 Fed. 80.....   | 69         |
| <i>Osaka Shosen Kaisha v. Pacific Export Lumber Com-<br/>pany</i> , 260 U. S. 490..... | 61, 71     |
| <i>Oreago, The</i> , 292 Fed. 463.....   | 65         |
| <i>Phoebe, The</i> , 1 Ware. (354), 360; Fed. Cas. 11065, 37-39, 44                    |            |
| <i>Philomena, The</i> , 200 Fed. 873.....  | 17, 25     |

|   | PAGE                              |
|---|-----------------------------------|
| <i>Piedmont &amp; Georges Creek Coal Co. v. Seaboard Fisheries Co.</i> , 254 U. S. 1.....   | 61, 71                            |
| <i>Poznan, The</i> , 276 Fed. 418.....  | 27-28                             |
| <i>Pulaski, The</i> , 33 Fed. 383.....  | 22                                |
| <i>Rupert City, The</i> , 213 Fed. 263.....   | 29-30                             |
| <i>St. Jago de Cuba, The</i> , 9 Wheat. 409.....  | 62, 63, 64                        |
| <i>St. Paul, The</i> , 271 Fed. 265.....  | 39-44, 49, 53, 57                 |
| <i>Scow 15, The</i> , 88 Fed. 305; 92 Fed. 1008.....  | 55                                |
| <i>Sheldrake v. The Chatfield</i> , 52 Fed. 495.....  | 52                                |
| Statutes:   |                                   |
| Act of June 23, 1910 (Lien Act of 1910), c. 373,<br>sec. 1; 36 Stat. 604, 60, 62, 66, 67, 68, 69, 71, 75                                      |                                   |
| Act of June 5, 1920 (Merchant Marine Act of<br>1920; Ship Mortgage Act of 1920), c. 250, sec.<br>30, sub-secs. P, X; 41 Stat. 1005, 1006..... | 23, 60, 66, 67, 69, 70-71, 73, 77 |
| Act of June 1, 1922, c. 204; 42 Stat. 615.....  | 47                                |
| R. S., sec. 829; 4 Stat. 678.....   | 46                                |
| <i>Strama, The</i> , 33 Fed. 281.....   | 63                                |
| <i>Sucken, The</i> , 286 Fed. 286.....  | 68                                |
| <i>Taylor v. Carryl</i> , 20 How. 583.....  | 22                                |
| <i>Trustees v. Greenough</i> , 105 U. S. 527; 26 L. Ed. 1157  | 40                                |
| <i>Tucker v. Alexandroff</i> , 183 U. S. 434.....   | 37                                |
| <i>Valencia, The</i> , 165 U. S. 264.....   | 63-64                             |
| <i>Vandewater v. Mills</i> , 19 How. 82.....  | 65, 71                            |
| <i>West Haven, The</i> , 297 Fed. 534.....  | 68                                |
| <i>Willamette Valley, The</i> , 76 Fed. 838.....  | 51, 52                            |
| <i>Young America, The</i> , 30 Fed. 789.....  | 15, 16-17, 35                     |





# Supreme Court of the United States,

OCTOBER TERM, 1926.

No. 229.

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NEW YORK DOCK COMPANY,

*Petitioner,*

—against—

Steamship POZNAN, her engines, etc., and  
JOHN B. HARRIS COMPANY,

*Respondent.*

---

## **BRIEF FOR RESPONDENT, JOHN B. HARRIS COMPANY.**

---

### ***Official Reports of the Opinions Below.***

The opinion of the Circuit Court of Appeals (R. 145) is reported in 9 Fed. (2d) 838; the main opinion of the District Court (R. 37) in 297 Fed. 345.

The supplemental opinion (R. 40) of the District Court has not been reported.

### ***Petitioner Has Shown No Adequate Reason for Invoking the Jurisdiction of This Court.***

None of the grounds for review stated in Supreme Court Rule 35, 5 (b) exist. Petitioner has cited no conflicting decision of another Circuit Court of Appeals. No question of local law is involved. The Court did not

decide any question of general law in a way untenable or in conflict with the weight of authority. No Federal question is involved. Despite the statements on page 48 of petitioner's brief, the Circuit Court of Appeals did not determine whether wharfage is a necessary within the meaning of the Act of 1920 and stated definitely: "We express no opinion concerning it at this time" (R. 161). Consequently the construction of that Act is not involved. There has been no departure from the usual course of judicial proceedings. Therefore the case is one of which this Court in the exercise of its discretion should refuse to take jurisdiction.

### ***Statement of the Case.***

This case is here on writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. On June 17, 1924, the District Court for the Southern District of New York, entered a decree for Sixteen thousand six hundred twenty-eight and 70/100 (\$16,628.70) Dollars with interest in favor of the petitioner (libellant below) for wharfage and incidental services rendered the SS *Poznan* (R. 138). On July 23, 1925, the Circuit Court of Appeals for the Second Circuit reversed this decree, and on August 10th, 1925, entered an order denying a rehearing.

The libel of the petitioner against the SS *Poznan* was filed on April 9, 1921. It alleges that on December 1, 1920, the master of the SS *Poznan* or the person to whom the management of said vessel was entrusted placed the *Poznan* at a wharf owned by libellant where she remained until March 12, 1921; that there is due for wharfage and lighting and cleaning of said wharf Seventeen thousand four hundred sixty-two and 03/100 (\$17,462.03) Dollars

with interest, which is a fair, reasonable and customary charge, and prays that the vessel be condemned and sold to pay said demand (R. 3, 4).

No answer was made on behalf of the vessel or her owners and a default decree was entered. Thereafter the respondent, John B. Harris Company, a cargo owner who had theretofore libelled the *Poznan* for damages arising out of breach of a contract of carriage, applied for and obtained leave to intervene and defend herein (R. 4, 5).

The answer of the respondent to the libel alleges that said wharfage and other services were not furnished on the credit of the *Poznan* nor arranged for with the master but were furnished solely upon the request of and in accordance with an agreement with, and upon the credit of the owner of said vessel, and that the vessel is not responsible therefor. The answer further alleges that the SS *Poznan* was in the custody of the United States Marshal at the times during which said wharfage is alleged to have been furnished and therefore no maritime lien could arise against the vessel (R. 6, 7).

The following facts were stipulated (R. 8-37) :

Polish-American Navigation Corporation (hereinafter called the Polish-American) is a Delaware corporation maintaining its principal office in New York City and was the owner of the SS *Poznan*, a vessel of 8,405.72 gross, 5,298 net and 11,250 dead weight tons, registered at the Port of New York (R. 8). On or about November 30th, 1920, petitioner and the Polish-American entered into an agreement for the use of Pier No. 6 by the *Poznan* to discharge, the Polish-American agreeing to pay Two hundred fifty (\$250) Dollars per day, charge to commence from 7 A. M., December 1st, 1920, and to continue up to the time the steamer left and/or all cargo

was removed, and certain sums for lighting and cleaning in addition (R. 8, 9). This agreement was not made with the master of the vessel, which arrived from Cuba and was made fast to said pier during the afternoon of December 2nd, and was arrested by the United States Marshal on the same afternoon (R. 9). A number of libels (subsequently consolidated and referred to in the record herein as the consolidated cause) for non-delivery at Havana of cargo shipped from New York and carried by the ship to Havana and back to New York without being discharged until the ship returned, were filed against the *Poznan*, the majority being filed prior to the libel of the petitioner (R. 10).

On December 7, 1920, A. M. Capen's Sons, Inc., filed a libel for possession of 403 bundles of wrapping paper against Acme Operating Corporation, the charterer of the *Poznan*, which paper had been part of the cargo on the steamship *Poznan*. The Court on the same day, after hearing counsel for the Acme Operating Corporation and the Polish-American, made an order for the delivery of the said paper, which was then being discharged, to the said A. M. Capen's Sons, Inc., upon the surrender of the bill of lading and filing of a bond to cover any return freight that might be due and also permitting any shipper of goods on the *Poznan* to obtain possession of his shipment upon similar conditions and upon his appearing in the above possessory libel of A. M. Capen's Sons, Inc. (R. 9, 16). Under this order many shippers obtained their cargo (R. 9). Discharge of the vessel was completed February 18, 1921, and delivery of the cargo from the pier on March 1st, 1921. The vessel remained fast to the pier until March 11, 1921, and thereafter the pier was cleaned and ready for another vessel on March 12, 1921. Thereafter, pursuant to the agreement, the petitioner ren-

dered its bill to the Polish-American in the sum of twenty-five thousand three hundred thirty-three and 33/100 (\$25,333.33) dollars for wharfage, eight hundred and five (\$805) dollars for lights and three hundred twenty-three and 70/100 (\$323.70) dollars for pier cleaning. On said indebtedness the Polish-American paid to petitioner at different times sums totaling nine thousand five hundred (\$9,500) dollars (R. 9, 10).

The vessel was continuously in the custody of the Marshal until she left the pier on March 11, 1921 (R. 10). On January 6th, 1921, the petitioner presented a bill for wharfage to the Marshal with a letter requesting advice in case there was any question as to his liability and stating that the Dock Company understood that the vessel had been under the Marshal's custody since the beginning of December and that as owner of Pier 6 it had entered into an agreement with the Polish-American for such wharfage with reference to same. On January 7th it wrote to the Marshal a letter referring to the Marshal's objection to the charge as improper as covering discharge and care of the cargo (R. 10, 11, 12) and received in reply a letter from the Marshal declining liability, in which the Marshal said

"The Marshal does not and will not assume liability for any charges against this vessel, until so directed by order of the Court" (R. 13).

On December 9th, 1921, the petitioner and the Polish-American agreed that the Polish-American was to pay its indebtedness of Seventeen thousand four hundred sixty-eight and 03/100 (\$17,468.03) Dollars, plus compromise settlement of interest in certain installments therein specified and in consideration thereof petitioner was to

refrain from pressing its claim for the sale of the *Poznan* (R. 13, 17, 18). The first payment only under said agreement was made, said payment being made and accepted after petitioner's exchange of letters with the Marshal (R. 13). Petitioner thereafter requested that its bill be included in the Marshal's bill of costs, which was done, but upon objection, same was struck out by the Clerk and by the Court as not a proper disbursement by the Marshal, without prejudice to the right of petitioner to claim against the proceeds of the vessel, if any such right there be (R. 13, 22, 23, 24).

The Polish-American, as owner, had chartered the *Poznan* under a time charter to the Acme Operating Corporation, by which charterer she was loaded at New York and sent on her voyage to Havana. Due to the congestion of the port there which existed in 1920, the owner claimed that she could not be discharged and therefore ordered her back to New York to discharge there, where it undertook the discharge at Pier 6, in a more or less intermittent manner, due to the insufficiency and inadequacy of the pier and the lack of opportunity to sort the goods according to marks. After this discharge had continued for more than a month with various partial lots of cargo piled up on the pier in such a manner as to make it almost inaccessible to the cargo owners, and as charter hire at the rate of \$67,500 per month was becoming due from the Acme Company to the Polish Company for every day that such discharge continued, the Acme Company demanded of the Polish Company that it move the *Poznan* from Pier 6 to another pier where the discharge could be completed expeditiously, advising that an empty dock in the immediate vicinity could be procured immediately (R. 29, 30, 31, 32).

On January 5, 1921, as this demand was refused, the Acme Operating Corporation obtained in the possessory suit of A. N. Capen's Sons, Inc. vs. 403 bales of wrapping paper and the Acme Operating Corporation, an order from Judge Augustus N. Hand requiring the Polish-American Navigation Corporation and all libellants intervening in the possessory suit to show cause on the same day why an order should not be entered directing the Polish-American to move the *Poznan* on January 6th to another pier, where she could discharge more expeditiously (R. 27, Exhibit G, 28-36). Upon the same day, on the above mentioned moving papers, with proof of due service thereof, Judge A. N. Hand signed an order as follows:

"After hearing members of the Shippers' Committee in person, and the members of the Shippers' Committee having requested the Proctors for the Polish-American Navigation Corporation and Acme Operating Corporation to suspend discharging the vessel for one week in order to enable the merchandise to be properly separated on the dock and the dock cleared for further discharging of the vessel and the Acme Operating Corp., the charterer Polish-American Navigation Corporation having acquiesced in said request, it is ordered that the motion of the Acme Operating Corporation be denied with leave to renew in 8 days" (Exhibit H, R. 36-37).

The motion, it appears, never was renewed and the discharge of the vessel continued until it was finished.

This case came on for trial before Judge Learned Hand, who filed an opinion holding that the petitioner had no maritime lien because the ship was in the custody



of the Court and the Court alone could pledge her upon such a lien. He further held, however, that the petitioner had an equitable lien on the fund in Court, in priority to the maritime liens of the consolidated libellants, for the wharfage between December 2nd and February 18th, when the ship was discharged and that after that date the rate should be what was paid by the *Poznan* after March 12th, at the usual statutory open wharfage rate for a vessel of that size, amounting to \$29.49 a day, unless it appeared that the lienors insisted on her remaining at Pier 6 after February 18th, or that her later berth was not available, or that they were benefitted by the continued higher wharfage there (R. 37-39). He later filed a supplemental opinion in which he held that no allowance was to be made for protection of the goods of the consolidated libellants on the pier after discharge and that the lien which he allowed was an equitable lien against the lienors' own rights in the vessel arising after she was in custody (R. 40).

Accordingly he entered his own decree on July 13, 1923, that the petitioner had an equitable lien upon the proceeds of sale in priority to the maritime liens of the consolidated libellants and referring it to a Commissioner to take proof and report on the reasonable value of the benefit enjoyed by the *consolidated libellants* from the wharfage from December 2nd, 1920, to February 18th, 1921, and from February 18th, 1921 to March 11th, 1921, and also the value of any added benefit from incidental services (R. 41-42). Hearings were had before the Commissioner resulting in a report by him allowing the full contract rate of \$250 per day from December 2nd to February 18th, the time when the vessel was discharged, and also from February 18th to March 11th, 1921, the period during which she lay empty at the wharf, and

during a large part of which time there was no cargo on the wharf, in spite of the fact that the petitioner's own witnesses Firth and Becker (R. 67, 68, 74) had shown that from \$50 to \$75 a day was the usual charge for berthing a vessel at a wharf where no cargo was being discharged, and where not only the wharf but the other side of the wharf was left free for other employment, and in spite of the fact that the uncontradicted testimony showed that many of the cargo owners who had become consolidated libellants had suffered enormously by the inadequacy and bad condition of the pier, and losing entire sight of the fact that not all of the parties in the possessory libel were parties in the consolidated libel. This report was later confirmed by the Court upon the same theory of a benefit to the consolidated libellants and an equitable lien, as that on which the interlocutory decree had been based. The Court adverted to the fact that the Committee of cargo owners seemed to have objected to the removal of the *Poznan*, apparently referring to the informal hearing at Judge A. N. Hand's Chambers on January 5th, 1921, and overlooked the fact that no objection was or could very well have been made to the removal of the vessel after February 18th when she was completely discharged (R. 138). A final decree was thereupon entered, based upon the decisions of the District Court, awarding the petitioner the full amount of \$250 per day from December 2, 1920 to March 11, 1921, with the charges for lighting and cleaning, together with interest and costs amounting in all to \$20,325.41 and decreeing that the same was a prior lien upon the proceeds of the sale of the vessel.

An appeal was thereupon taken by the respondent John B. Harris Company to the United States Circuit Court of Appeals for the Second Circuit. That Court

with Judges Rogers, Hough and Manton sitting, filed a unanimous opinion holding that the District Court correctly decided that no maritime lien for the wharfage arose because the vessel was in the custody of the Court and further deciding that the wharfage was furnished by the petitioner on the credit of the owner, the Polish-American, and not on the credit of the vessel and that no maritime lien arose under the general maritime law (R. 159); also, that the equitable lien decreed by the District Court on the proceeds of the vessel had no foundation in authority and was contrary to principle, and that the decision below based thereon appeared to have been wholly unwarranted. The Court also remarked that the question as to whether wharfage is a "necessary" within the meaning of the Merchant Marine Act of 1920 was not argued when the case was heard and that as it was not important in the view taken of the case, no opinion concerning it was expressed (R. 161). The decree of the District Court was accordingly reversed. Thereafter this Court granted petitioner's application for certiorari to review the decision of the Circuit Court of Appeals.

## POINT I.

**Both lower Courts properly held that no maritime lien for the wharfage, lighting and cleaning existed against the vessel or her proceeds because of the fact that the vessel was, during the period in question, in *custodia legis*.**

### A. REASONS FOR THE RULE.

This doctrine has long been established law in this country and is based on several considerations. In the

first place, a maritime lien, as has often been said, is a secret one which may operate to the prejudice of general creditors and purchasers without notice. It is therefore regarded *stricti juris* and cannot be extended by construction, analogy or inference, as held by this Court in *Ozaka Shosen Kaisha v. Pacific Export Lumber Company*, 260 U. S. 490. In the second place, as the Court takes the place of the owner, no lien can be created against a vessel in the custody of the Court except by an order of the Court. While the vessel is in the Court's custody it is held to await the outcome of the litigation for the benefit of those persons who are ultimately entitled to it. It would be a sad travesty on justice if it were possible for the owner and other parties whose interest might be advanced thereby to impress a lien on a vessel while in the Court's custody to the detriment of those who had other interests in and were ultimately to receive her. Accordingly, the rule was early laid down that if one desires to impress a lien on a vessel in custody he must apply to the Court having that custody so that the Court may investigate the facts and determine whether the lien is one that should be impressed or not. The authority of the owner to create a lien is suspended, as the Court stands for the time being in the shoes of the owner. How salutary this rule is in the light of facts such as exist in the case at bar is readily seen.

The owner was interested in continuing the discharge of the ship in the hope of recovering freight on the cargo for the return voyage from Havana and then getting her released for further use. Certain shippers, part of whose cargo had been discharged on *Five G*, apparently preferred to have the remainder discharged

three. Other shippers whose cargo had all been discharged, and those who had none of their cargo discharged, were anxious that it should be discharged somewhere else. Those whose cargo was being discharged into lighters over the side of the ship had no particular interest in the matter. Petitioner was interested in keeping the vessel at Pier 6 so as to collect the large amount of daily wharfage from the owner under its contract and if it could collect the \$250 daily rate for the period after the ship was entirely discharged and even after the cargo was all removed it was especially interested in keeping the vessel there as that freed the other side of the pier and, in fact, for part of the time the whole pier itself. The cargo consolidated libellants who were interested in keeping down the expense, had no knowledge that the petitioner was asserting a lien against the ship or that the wharfage payable under the contract with the owner was not being paid. No demand or notice of any such claim or lien was at any time given by the petitioner to such libellants. Indeed, when petitioner wrote its two letters to the Marshal of January 6th and 7th, 1921, and received the Marshal's reply of January 7, 1921 (R. 11, 12, 13), the letters themselves show that the petitioner knew that the vessel was in the custody of the Marshal; that he objected to any such exorbitant claim for wharfage based largely on the charge for discharging and stowing the cargo, and that the Marshal did not and would not assume liability for any charges against the vessel until so directed by order of the Court, and that an application had been made to Judge Hand with reference to moving the vessel, which order had been denied with leave to renew in eight (8) days. Yet, in

spite of all this, not a move was made by the petitioner either to apply to the Court for an order with reference to the wharfage or to give any notice to the consolidated libellants.

11. THE AUTHORITIES HOLD WITH REMARKABLE UNANIMITY THAT THERE CAN BE NO MARITIME LIEN UNDER THE CIRCUMSTANCES AT BAR.

In *The Estaban de Antunano*, 31 Fed. 920, one of the early cases establishing the rule, Judge Pardee held that there could be no lien for services or supplies furnished to a vessel while in the custody of the Court. No point is made in the opinion that the seizure was by the Sheriff rather than by the Marshal. The vessel was all ready to sail with passengers, cargo and crew aboard at the time of the seizure, and the expectation that matters would be settled was so strong that many passengers remained on board for several days thereafter. The crew remained on board working under the direction of the master in painting, scrubbing and otherwise keeping the ship in order. Various libellants at the instance of the master, and expecting that difficulties would soon end and the voyage proceed, furnished supplies needed for the officers and crew and for the ship. No application, however, was made to the Sheriff or to the Court for authority to furnish supplies on the credit of the ship. Later an order was made to furnish provisions to the crew to the extent of \$25 per day. The Court ordered that the libels of the seamen for services rendered after the seizure be dismissed, and those of the material men should be maintained only for the amount of supplies furnished before the seizure of the vessel, and that the lien claim

of a laundry for washing the linen of the ship during the seizure should be denied, saying:

"When the sheriff of the parish of Orleans, Louisiana, seized and took into his possession, under process from the state court, the steamship *Antunano*, she went into the custody of the law, and her contemplated voyage was broken up and abandoned, and thereby the authority of her owners, and of their agents, the master and ship's husband, to thereafter affect the ship by any conduct or contract to result in a lien on the ship, was ended. By the seizure all persons were notified of the change of control and possession. While the ship was in the custody of the law, it is doubtful whether on any account, or for any service (except, perhaps, for salvage, or through a collision), any lien could arise on the ship; certainly not without the express authority of the court having the property in possession. Liens for supplies and materials are based on contracts entered into on behalf of the ship. Where there is no representative of the ship or her owners authorized to contract, there can be no contract, and therefore no lien based on a contract. The supposed necessities of the ship, or of her crew, would warrant no person in interfering without the authority of the sheriff or the court" (p. 924).

In *The Grapeshot*, 22 Fed. 123 (D. C., S. D. N. Y.), Judge Brown held that a lien for coal supplied to the vessel while she was in the lawful custody of the Marshal must be postponed to all other claims, stating as follows (pp. 124, 125):

"It cannot be allowed that the claims of libellants shall be prejudiced by any supplies subse-

quently furnished while the vessel is legally in the custody of the Court, through the possession of the Marshal, in consequence of any consent that he may have given to her further navigation."

It is thus seen that the Marshal may not impose any maritime lien on the vessel in his custody by any consent to her navigation. This answers the argument of petitioner that because the Marshal did not interfere with the discharge he in some way impressed a lien on the vessel for wharfage.

In *The Augustine Kobbe*, 37 Fed. 702, claim of lien was made for the sum of \$343 advanced by the libellants as charterers after the seizure of the vessel. The Court says :

"From the evidence it appears that this claim arose while the vessel was in the custody of the Court, and, as it was not necessary for the due care and preservation of the vessel, it cannot be recognized as a lien. \* \* \* I think the principle laid down in the case of *The Young America*, 30 Fed. Rep. 790, and of the *Esteban De Antunano*, 31 Fed. Rep. 921, is a just one, and should be applied in this case to the item of \$343, claimed as a part of the damages sued for. That principle, as applied here, is that when the Marshal seized and took into his possession, under process from this court, the vessel, she went into the custody of the law, and her contemplated voyage was broken up and abandoned, and thereby the authority of her owners and of their agent, the master, to thereafter affect the ship by any contract or conduct to result in a lien on the ship, was ended. By the seizure all persons were notified of the change of control and possession" (p. 702).



In a former decision affecting this same vessel (*The Augustine Kobbe*, 37 Fed. 696), the Court held that the claim of a mate who remained on the vessel after her seizure, seeking compensation for services in aiding the Marshal in handling her, was not a maritime lien on the proceeds (p. 701) :

“Of whatever merit the claim might be as a part of the Marshal’s expenses, if recognized by him, it certainly is not a maritime claim to be enforced against the proceeds of the vessel.”

In *The Young America*, 30 Fed. 789, cited by the petitioner (Brief, p. 30), the parties who libelled the vessel permitted her to pursue her ordinary business around the harbor with no Marshal’s keeper on board and no notice of attachment posted upon her mast. The Court found on the facts that the vessel was not in the custody of the Court at all and sustained the lien claimed by one who had furnished supplies to the vessel without any notice of her arrest. Not only was there no possession by the Marshal but no publication of the summons until after the lien claimants dealt with the vessel. A coal dealer was allowed a lien for the coal supplied before he had any notice of the attachment, but for coal supplied thereafter no lien was allowed. The Court said at page 790 :

“When a vessel is arrested in admiralty, under process of the court, the law requires that she be kept safely by the marshal for the benefit of the parties to the cause, and of all others who may be interested in her. It has been often held, accordingly, that the marshal has no authority to create or to permit charges upon the property beyond

such as are necessary for its due care and preservation; and no claims arising while the vessel is in the custody of the court are recognized as liens strictly, though they may be paid out of the remnants."

In *The Philomena*, 200 Fed. 873 (D. C. Mass.), Judge Dodge held that an engineer remaining on the vessel after it had been taken into the Marshal's custody had no lien for wages during that period.

In *The Geisha*, 200 Fed. 865, 870, the same Judge held that where a vessel was seized by the Sheriff while repairs were being made upon her, and while she was at a wharf, there was no maritime lien for the wharfage accruing while she was in the Sheriff's custody and that for that wharfage the libellant must look to the Sheriff; that the Sheriff could not have kept her at the wharf against the libellant's objection and he stood in no such relation to the vessel as authorized him to bind her by any agreement with libellant, and that any expense incurred for wharfage by the Marshal while the vessel was in his custody was presumably included in his charges on the warrant under which he arrested and held her. Accordingly all wharfage was disallowed as a lien for the period while the vessel was in the Court's custody.

In *The Bethulia*, 200 Fed. 876, the same Judge also held that an engineer of a steamer had no maritime lien for his wages after the steamer was attached in the State Court by the Sheriff, and that the engineer must look to the owner for his pay during that period.

In *The Nissequogue*, 280 Fed. 174 (D. C., E. D. N. C.),

the Court held that during the time the Marshal had no actual custody, no keeper on board, and had posted no notice on the vessel, the seamen remaining on the vessel and a materialman furnishing supplies without any notice of the libel could acquire a lien on the vessel, but that after the Marshal took actual possession or custody or after claimants had notice of the libel, no maritime lien could be allowed to the claimants for services or supplies thereafter furnished to the vessel, and accordingly the claims of seamen and material men for services and supplies after such date were disallowed as liens (pp. 184, 185).

This case is not contrary to the settled *custodia legis* rule as seems to be suggested by the petitioner (Brief, p. 35).

The seamen's wages were not disallowed because the vessel was not navigating after her arrest and the claim for repairs was certainly not allowed as an expense of justice if by that petitioner means the keeping of the vessel in safe custody. No theory of a necessary expense of operation while in custody was involved and no such theory is supported by the decision. The Marshal has no right to operate. The statute requires him only to keep safely in his possession. He cannot, therefore, impress a lien for operation. Under a receivership, on the contrary, the Court has authority to order operation.

In *The Astoria*, 281 Fed. 619, the Circuit Court of Appeals for the Fifth Circuit held that seamen were not entitled to a maritime lien for wages accruing after the vessel was placed in the custody of the law, and that a supply man who furnished supplies for the crew while

the ship was in custody under the order of the Court to furnish them something to eat did not acquire a maritime lien as it did not appear that the crew remained on board under order of Court or rendered any service to the Marshal who was the custodian, and that if the crew remained on board and the Court acquiesced in it no maritime lien was thereby created, but that the supply man who furnished the food supplies could make an application for an allowance out of the extra month's pay awarded the crew under the statute.

In *The Culgoa*, 8 Fed. (2d) 62, District of New Jersey, Judge Bodine held (p. 63):

"Obviously the libellant can acquire no lien for supplies furnished after the seizure of the vessel by the United States marshal in admiralty proceedings. See *New York Dock Co. v. S.S. Poznan* (D. C.) 297 F. 345."

In *The Commack*, 8 Fed. (2d) 151 (Southern Dist. Fla.), certain services and supplies were furnished the vessel on the order of the master after her seizure. Judge Call held that they could not constitute maritime liens notwithstanding ignorance of the lienors that the vessel had been attached, and that neither the master, owner nor Marshal could affix a maritime lien to any vessel after seizure under process; but that wages of seamen earned before the seizure of the vessel and supplies furnished before that date would be allowed as maritime liens, saying (p. 153):

"I know of no principle of law which makes it the duty of the custodian to notify parties dealing with the master that he is custodian, and in the absence of such notice the claims for serv-

ices rendered or supplies furnished become maritime liens, or entitled to payment in priority to maritime liens."

In *The Jeanette*, 9 Fed. (2d) 408 (So. Dist. Fla.), the vessel was seized by the United States officials for violation of the immigration and customs laws and remained in their custody. Judge Call held that a maritime lien on a vessel could not be created by the master while she was in the custody of the law and that it was immaterial whether or not the owner abandoned the vessel; that he was powerless to create a maritime lien after the seizure of the vessel.

In *The Clarence B. Mitchell*, 1926 A. M. C. 1584 (D. C. Mass., Oct. 6, 1926, not officially reported), a vessel was libelled, arrested and a keeper placed on board by the Marshal on July 9th. On July 12th the keeper was withdrawn to save expense upon agreement of proctors. Subsequently certain repairs were performed on the vessel by one Green upon the order of the owner and the former master of the vessel remained on board upon the owner's agreement to pay him wages. Subsequent to the sale of the vessel petitions were filed by Green and the master for the services rendered to the vessel upon the owner's order, and with knowledge of her arrest. She was sold on August 28th. In denying the liens, Judge Morton said (p. 1585):

"It is a well-known principle of law that a repair man cannot have a maritime lien for work which he does on a vessel upon the order of her owner while that vessel is in Marshal's custody. This rule also applies to men working on the vessel

whether or not in the capacity of seamen. The evidence in this case shows that no orders were given by the Marshal or his duly authorized representative for any work to be done on the vessel. It follows, therefore, that so much of the claims of the intervening petitioners which are for materials furnished and services rendered between July 9, 1926 and August 28, 1926, must be disallowed."

In *Kjaer v. Etier*, 222 Fed. 243, 137 C. C. A. 659 (5th Circ.), the libellant's husband, a caretaker of a steamer in the custody of the Marshal, was killed by falling through an opening in the floor of the fidley. The Court held that the ship was in *custodia legis* and that the Marshal, representing the United States, was in possession, and that the owners owed no other duty than not to injure wilfully the decedent; that if the place was dangerous and ought to have been lighted, it was the fault and negligence of the Marshal and the owners were not responsible, referring to *The Esteban De Antunano*, 31 Fed. 920.

Petitioner (p. 31) attempts to distinguish the cases cited by the Circuit Court of Appeals in support of its ruling that when a "vessel is in *custodia legis* she is for the time being withdrawn from navigation and no lien arises for wharfage charges incurred during the period she is so withdrawn" (R. 154-157), and seeks to show that none of the cases support the conclusion reached. It criticises the use by that Court of the term "withdrawal from navigation" and attaches entirely too narrow a conception of the meaning of the phrase. It divides into three groups the cases cited by the lower Court on this question, but such classification is merely arbitrary for the reason

that the ground of petitioner's classification was not the ground at all on which the Courts decided the cases. The ground of decision was that the custody of the Court caused lack of authority in anyone other than the Court to bind the ship, and so it is immaterial whether in the various cases cited the navigation or maritime activity, if one chooses to call it such, has been terminated by the operation of the law, or by the parties, or whether the claim was for seamen's wages. We therefore pass over the cases of *The C. Vanderbilt*, 86 Fed. 785, *The Andrew J. Smith*, 263 Fed. 1004, *The Pulaski*, 33 Fed. 383, and *The Fortuna*, 206 Fed. 573, as all of these cases involve not at all the point which we are engaged upon.

In *The Estaban de Antunano*, 31 Fed. 920, and *The Mary K. Campbell*, 31 Fed. 840, petitioner solemnly states (p. 34) that as these vessels were levied upon under a state law and by a sheriff, they passed out of the admiralty and maritime jurisdiction, ceased to be ships competent to contract or individually liable for obligations, and went into the custody of the law as a mere chattel, citing *Taylor v. Carryl*, 20 How. 583. As we have already seen, there is no authority whatsoever for such a distinction under that case or any other. Whether the ship is seized by a state court or an admiralty court, the status is entirely the same. No authority has ever held to the contrary. She is as much a vessel as she ever was. No one has had the temerity heretofore to argue, so far as we can recollect, that a vessel's personality or characteristics are different in any way when she is seized by an admiralty court from what they are when seized by a state court.

The real point is that when she goes into the custody of the court, whether it be state or admiralty, there is a change in the power and authority to create liens.

There is no foundation either in authority or in reason for the statement by petitioner that what a sheriff pays for keeping a vessel in his custody is not wharfage. In *The Geisha*, 200 Fed. 865, 870, the Court specifically speaks of and describes it as "wharfage".

On page 34 of its brief, subdivision 3, petitioner refers to five cases stating that in each a maritime lien for seamen's wages after arrest was denied for the reason that the voyage was terminated because of the peculiarity of the seamen's contract and when the voyage was at an end, his occupation was gone, and that the maritime lien was denied from the date of the seamen's discharge or the abandonment of the voyage, and that if there were no sailing there could be no sailors' wages. We shall see from an analysis of these cases that petitioner is mistaken in the conclusions it draws. Its conception of the duty of a seaman is also faulty. After the vessel arrives in port he still has many duties to perform. This Court lately decided in *International Stevedoring Company v. Harerty*, Oct. 18, 1926, 272 U. S. —, 71 L. Ed. 22, 1926 A. M. C. 1638, that the word "seaman" used in the Merchant Marine Act of 1920 included longshoremen employed by stevedores while on a vessel, pointing out that the work upon which the longshoreman was engaged was a service formerly rendered by the ship's crew, and citing *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 62. Indeed, on the modern steamer the service performed by the crew while in port is often as important as that at sea.



The engineers and firemen have to maintain the fires, and keep steam on the boilers for heat, for running the auxiliary engines, winches for loading and discharge, dynamos, pumps, and for innumerable other purposes. The crew must do the necessary painting outside and inside, the repairing and overhauling of the engines and ship generally, and multitudinous things with which we are familiar. The officers must check and supervise receipt, stowage and delivery of cargo. The theory that without sailing there can be no sailors' wages is contrary to all experience. The sailor may be even busier while the ship is in port than he is while the ship is at sea. In fact, the mates are often busier in connection with the receiving and delivery of cargo, which frequently continues night and day.

In *The Augustine Kobbe*, 37 Fed. 696, there was no question of allowing the seamen a lien while the vessel was under seizure but as they were discharged when the vessel was seized and could have obtained other employment, they were not allowed further wages. What the Court decided was that one who supplied meat to the vessel after seizure, and after the discharge of the crew at the time of seizure, could have no maritime lien (p. 699), and that the mate, who remained on the vessel after her seizure and aided the Marshal in handling her, could have no maritime lien, whatever merit his claim might have as part of the Marshal's expenses. His claim of lien was not disallowed because he was a mariner and the ship was not sailing but because the ship was in custody and he was aiding the Marshal (p. 701).

In *The Erinagh*, 7 Fed. 231, the master of a bark contracted for a watchman on September 24th. The

ship was seized under a writ by the Marshal on October 29th. It was held that the claim for the watchman's services after October 29th was properly disallowed; that his contract was for his services during the state of things existing at the time he was employed, and that that state of things was terminated by the discharge of the cargo and attachment of the vessel; that there was no necessity for the watchman after her seizure by the Marshal, and that if the watchman did not discover that the vessel was in the custody of the Marshal, it was his own fault. There was no question of a seaman's lien in that case. There was a question as to whether the master would be allowed a lien under foreign law for his wages and it was held that they would be postponed to the lien of the watchman for services before the seizure, one law giving the master no lien.

*The Astoria*, 2d Fed. 619, cited by petitioners, dealt not only with crew's wages but also a lien for supplies while the ship was in custody. Upon the wages claim the Court said (p. 621):

"Upon the merits, we are of opinion that there was no maritime lien in favor of the crew for wages after the vessel was placed in the custody of the law, except for the crew month's wages authorized by statute, and that the crew in the crew should be subordinated accordingly. *The Duches de Lauzun*, (11, C.) 3d Fed. 620; *The Augustus Noble*, (14, C.) 3d Fed. 626; *The Philomene*, (15, C.) 2d Fed. 673; *The Australia* (19, C.) 2d Fed. 676."

As to the claim of the Panama Canal for advances for food supplies for the crew under an order of the Court to furnish them something to eat, the Court said:

"The Panama Canal, by complying with this order, did not acquire a lien. It does not appear that the crew remained on board the vessel under order of the Court, or that they rendered any service to the *Marcelin*, who became custodian and was compensated therefor. If the crew remained on board, and the Court acquiesced in it, no maritime lien was thereby created" (pp. 125, 126).

The holding that the acquiescence of the Court in the crew remaining on board or in furnishing supplies would not give a maritime lien, is a further answer to petitioner's argument that Judge A. N. Hand's order of January 5, 1921, was in some way an acquiescence of the Court in the supplying of wharfage to the vessel.

The petitioner seeks to distinguish the cases cited by the Circuit Court of Appeals on the ground that for one reason or another the vessels in those cases were withdrawn from navigation or "maritime activities" and the voyages broken up. It is submitted, however, that the *Panama* was withdrawn from maritime activities quite as effectively as the vessels in the cases cited. The voyage of the *Panama* was from New York to Havana to deliver cargo there. When she failed to deliver it and returned to New York she abandoned her voyage as effectively as she ever could have.

Petitioner argues, p. 37, that its agreement with the United American Corporation for the use of Pier 6 was something different from the ordinary lease of a pier. The

question is not important, in our opinion, but as such stress is laid on it we should point out that under the contract between the petitioner and the Polish Company the Polish Company agreed to pay for the use of the pier \$250 per day from 7 A. M. on December 1, 1920, and up to the time the steamer and all cargo were removed, and in addition a sum for lights and for cleaning the pier and carting away rubbish. If this was not a lease or ordinary hiring of the pier from 7 A. M. December 1st up to the time the steamer and cargo were removed, then we must do violence to plain language, for the hire had to be paid whether the steamer arrived at 7 A. M. on December 1st or not, and was due just the same from that time even if she had not arrived until the 15th of December. As a matter of fact she did not arrive until after December 1st, and yet the Polish Company was billed from the morning of December 1st. The very bill which petitioner sent to the Marshal contained charges from December 1st at 7 A. M. The contract was therefore not for the wharfage furnished to the vessel but was a hiring of the pier from December 1st until the vessel and cargo had left, no matter when the steamer arrived or when she left. The cleaning of the pier, the furnishing of the lights, the carting of the rubbish were all for the benefit of the ship owner or the cargo owner and not for the benefit of the ship.

Petitioner argues (p. 39) that respondent has adopted the rule of law contended for by petitioner on the ground that the Court held in *The Porwan*, 276 Fed. 418, 435, that the libellants could recover damages for breach of the contract of affreightment and for negligence in the

discharge of the cargo. What the Court actually decided was that the libellants were entitled to receive the difference between the value of the shipment at the time it should have been delivered at Havana and the value at the time it was delivered in New York. The cause of action and the lien arose when the *Poznan* abandoned her voyage by leaving Havana as the Court held on page 431. It points out that part of that damage might be due to negligent stowage before starting from New York and part due to pilferage during loading or during discharge, and part due to breakage during loading and discharge, but those were merely incidental elements of the total difference in value which the Court awarded. The suits and the liens sustained were for breach of contract to deliver. No question was raised as to whether these incidental elements were proper elements of damage, because the vessel was in the custody of the Marshal; nor would an incorrect decision on that point in another case warrant an erroneous one in the case at bar.

C. A MARITIME LIEN ARISES ONLY AS AND WHEN THE SERVICES ARE RENDERED.

The District Court held that the contract of the New York Dock Company with the Polish-American Navigation Corporation could not create any lien after the Marshal once took charge; that if a lien ever arose, it ceased on December 2nd; and that the contract ceased to control as soon as the Marshal took possession (R. 38).

This particular point was not specifically dealt with in the opinion of the Circuit Court of Appeals and the

petitioner now contends in Point V of its brief that the arrest of the vessel did not terminate the lien, which it contends arose a few minutes or hours before, when the vessel arrived at the wharf. The contention is that the lien for wharfage, if once created, survived the arrest of the vessel and continued so long as the vessel received the wharfage service.

The cases cited in support of this contention have no reference to the conclusion sought to be predicated on them. There is not any proper analogy between the undoubted doctrine that a maritime lien is a *jus in re* good against innocent purchasers without notice, and the theory advanced by the petitioner that a maritime lien day by day continues to arise after arrest by virtue of a contract or arrangement made prior to arrest.

The contention of the petitioner is contrary to the principle underlying the cases already discussed holding that the owner cannot create a lien on a vessel *in custodia legis*. At least three of these cases, however, show not only that a lien cannot arise after the vessel is taken into custody, but also that supplies or services giving rise to a lien before arrest will not support a lien insofar as they have been furnished after arrest, though under the same contract.

In *The Rupert City* (1914), 213 Fed. 263, 271, exceptions were filed to the finding of the special commissioner that the master's wages terminated on the date that the vessel was taken into custody by the United States Marshal. The master was in an exactly similar situation to that of the petitioner in this case because he continued to act after arrest in accordance with his pre-existing contract as master. The Court affirmed the

finding of the commissioner on the ground that the control of her owners over the vessel ended upon seizure by the Marshal, and their power and the power of their agents to encumber her with liens necessarily ceased.

In *The Commack* (1925), 8 Fed. (2d) 151, numerous interventions setting up maritime liens against the proceeds of the vessel were filed and referred to a special commissioner. One class of intervenors filed exceptions to the commissioner's allowance to lienors for services and supplies insofar as they were furnished subsequent to the attachment of the vessel by the Marshal. On these exceptions, the Court held that all claims for services and supplies furnished after the seizure of the vessel are not maritime liens and that their payment must be postponed until all maritime liens were paid.

The Court further held in that case in respect of a claim by one of the intervenors for money advanced to pay seamen and for supplies and stevedoring services, that such intervenor had a lien only for such sum as was advanced to pay the wages of seamen earned before the seizure and to pay for supplies and stevedoring services furnished before that date. The criterion by which the Court determined whether or not a maritime lien existed was not the time when the contracts to serve as seamen or to furnish the supplies and services were made, but the time when the services were actually furnished.

In *The Astoria* (C. C. A., 5th, 1922), 281 Fed. 618, 621, a maritime lien was asserted for wages arising out of shipping articles entered into before, and the term of which expired after, the vessel was seized by the Marshal. Insofar as wages accrued after seizure by the Marshal a

lien was denied. The crew were allowed an extra month's wages, not on the ground that they were earned after seizure, but that the right to such extra wages accrued before seizure by the Marshal.

In *The Irages*, 283 Fed. 445 (S. D. Fla.), seamen libelled the vessel for wages which accrued part of the time before the vessel was taken in custody by the Marshal and part of the time thereafter. No showing was made of services rendered to the Marshal. Judge Call held that there should be no recovery for wages subsequent to the attachment of the vessel (p. 446).

In *The Bethlehem*, 286 Fed. 400, 402, libels were filed for wages against the *Bethlehem* for services performed partly before and partly after the attachment of the vessel by the Marshal. The Court held that no lien could be allowed for that part of the wages which accrued after the attachment of the vessel by the Marshal.

D. THE WHARFAGE DID NOT ACCRUE UPON THE ORDER OF THE COURT OR UPON THE CONSENT OF THE RESPONDENT.

We have shown that no lien ever arises for wharfage against a vessel or her proceeds while she is in *custodia legis*, except when furnished as a necessary incident to the prosecution of the suit and upon the Court's order.

Petitioner again mistakenly assumes that it was by consent of respondent and by order of court that the *Poznan* was permitted to function as a vessel by discharge and delivery of her cargo at petitioner's wharf. All that Judge A. N. Hand did was for the time being not to interfere in the dispute between the charterer, the owner and some of the shippers, which had ended by the time the



Court made its order. In the possessory suit of A. M. Capen Sons, the Court merely ordered the delivery of the cargo by the charterer, not specifying whether it was to be on any dock or into lighters. It was immaterial to the Court or to Capen whether the cargo was discharged on petitioner's wharf or some where else. It was the duty of the charterer to find the place. How then was it in obedience to such two orders that the *Poznan* remained at Pier 6? As we have seen, it is not customary and would have been unnecessarily harsh for the Court or the consolidated libellants to have interfered as long as the safety of the vessel was not threatened.

The hearing in chambers on January 5, 1921, cannot have any bearing upon this question. In the first place, the petitioner was not a party to the motion and did not attend. It could not be bound by any order of the Court and therefore by familiar rules could take no benefit therefrom. Both the stipulation of January 20th, 1923 (R. 27) and the order to show cause (R. 28) and the affidavits on which it was based (R. 29-35) and the order entered thereon (R. 36-37) plainly show that the application was not made in the consolidated libel brought against the vessel for a breach of contract but in the possessory libel brought by A. M. Capen's Sons, Inc., against the bundles of wrapping paper and the Acme Operating Corporation for possession of its shipment and not against the *Poznan* at all, and that notice was only given to such parties as had intervened in such possessory libel and not to the consolidated libellants. It is not shown what members of the Shippers' Committee were there except Mr. Day, part of whose cargo was on the dock and part on the vessel. Petitioner states in its brief (p. 29) that it was upon the request of the respond-

ent herein, with other cargo claimants, that the Court denied the application of the charterer for an order requiring the owner to remove the vessel from Pier 6 (R. 36). We find no such evidence on that page. The order entered recited proof of due service upon Hunt, Hill & Betts, proctors for the libellant, who was A. M. Capen's Sons, Inc., and upon certain other proctors for intervening shippers. Nowhere is the name of the John B. Harris Company mentioned. Indeed, it is difficult to see how Hunt, Hill & Betts, as proctors for A. M. Capen's Sons, could have objected for the reason that the order for the delivery of this paper by the Acme Company in the possessory suit was entered on December 11, 1920, and recited that the paper was then being discharged (R. 16) and as the order of the District Court affirming the taxation of the Marshal's fees recites that the bales of paper of respondent were bonded and removed within 48 hours after the attachment (R. 23), from which it may be conclusively inferred that such cargo had been long since received by the respondent. Moreover, at the meeting at Judge A. N. Hand's chambers the order shows (R. 36) that Hunt, Hill & Betts, as proctors, made no objection to the moving of the vessel, as may be easily understood from the fact that many of the possessory libellants had no interest in the vessel remaining at Pier 6, and this, of course, explains the attendance of members of the Shippers' Committee who could themselves state their various preferences.

The order itself shows that on the hearing the Acme Operating Corporation abandoned its motion for the time being and all parties agreed that the discharge should stop for one week, with no decision as to what should be subsequently done with the vessel.

The best evidence as to whether the consolidated libellants or the Marshal consented to or objected to the wharfage claimed by petitioner is found in the order entered in the District Court sustaining the decision of the Clerk on the taxation of the Marshal's fees that such claim was not a proper expense of the Marshal. This order shows that the consolidated libellants objected to the claim on the ground that the Marshal had made no arrangement with the petitioner for such wharfage but that petitioner had made it with the ship owner and had accepted payment on account from the owner, and the owner's note not then due for the balance of its bill (R. 23). This order was made almost a year and a half after the consent order of Judge A. N. Hand, which petitioner now claims was a consent to its wharfage claim by the consolidated libellants. Yet on such evidence as this, petitioner bases its claim that its bill for wharfage was by order of the Court and on the consent of the consolidated libellants. Nowhere on the moving papers, nor on the hearing, was any mention made of petitioner's claim for \$250 a day or that whatever agreement the Polish-American Company had with petitioner was not being duly carried out. Can it be said that under these circumstances a full and fair disclosure of the facts was made to Judge A. N. Hand as to petitioner's claim or that he had any idea, when he made his order on consent, that he was encumbering the ship with a preferred claim for wharfage to the extent of \$250 a day? What can be said about the period from December 2, 1920 to January 5, 1921? Could such order on January 5th, have any effect in impressing a lien for petitioner's claim for such period? What about the period after the ship was entirely discharged on February 18, 1921, or after the

cargo was all removed from the dock on March 11th, 1921? Could the order of Judge A. N. Hand have any bearing on such periods? We have gone into this meeting at Judge A. N. Hand's chambers thus fully because repeatedly in its brief, petitioner makes statements that its wharfage was furnished by the consent of the consolidated libellants and upon the order of the Court. When the facts are carefully examined it is seen that the force of this contention vanishes.

What *The Young America*, 30 Fed. 789, cited by petitioner (p. 30) really held was that the rule that liens upon vessels cannot be acquired while they are in custody is not applicable to an arrest formal only, when by consent of the parties the Marshall does not keep her in custody or put a keeper on board, or post a notice on her, or publish the process, but she is re-delivered to the owner and allowed to engage in her usual business about the harbor and to incur maritime obligations toward third persons having no notice of her arrest, as we have seen.

## POINT II.

**Petitioner's claim of a lien for wharfage furnished the *Poznan* while she was in *custodia legis*, as an expense of justice, is not sustained by the facts, or by the authorities.**

**A. PETITIONER'S SERVICES WERE NOT RENDERED FOR THE PRESERVATION OF RES.**

Petitioner argues in its brief, Point I, page 10, for a lien for its enormous claim for wharfage for ship and cargo, as an expense of justice, meaning the expense of the Court in preserving the subject-matter of the suit pending the bonding of the vessel or the termination of litigation. But as we have seen such a charge can only be created as part of the Marshal's expenses by agreement of the Marshal and can only be a lien by order of the Court.

In this case the vessel was not placed at the wharf by the Marshal but by the owner of the vessel for its own purposes and when the matter was brought to the Marshal's attention he expressly notified the petitioner in writing that he would not be responsible for any such charges. As no application was made to the Court to fix the rate of wharfage or make it a lien, it is difficult to see how the petitioner's claim could be sustained on the theory that it was an expense of justice. The mere facts that the vessel owner was interested in getting the cargo discharged under its contract with the petitioner and that many of the possessory libellants were interested in getting their cargo, though some of them were not consolidated libellants against the ship, would not make petitioner's enormous claim an expense of justice for the ship.

When the vessel was moved from Pier 6 to the

wharf which the Marshal himself contracted for she was berthed for safekeeping at the rate of \$29.49 per day (the legal rate in New York) (R. 20).

We need cite no authorities to prove that the purpose of the seizure by the Marshal is the preservation of the vessel pending the litigation and its ultimate determination. His sole duty is to take her into custody and to keep her safely during that time. He is not obliged to exclude the owners' crew or to prevent loading or discharging under agreements made by the owner with other parties, provided such action does not interfere with the safety of the vessel or with his custody. It is safe to say that in the vast majority of cases where vessels are libelled and put in the Marshal's custody, the Marshal never interferes with any arrangements for wharfage made by the owner of the vessel or with any of the owners' engagements, because as a rule they do not affect the vessel's safety. The wharfinger is glad enough to look to the owner for his wharfage, knowing that he cannot impress any lien on the ship while she is in the Marshal's possession.

B. PETITIONER'S CASES DO NOT SUPPORT ITS CONCLUSION.

In *Tucker v. Alexandroff*, 183 U. S. 424, 438, the language of this Court quoted by petitioner was used in pointing out the difference between the status of a ship before she was launched and thereafter, which was the real point at issue.

In *The Phebe*, 1 Ware (354), 360 Fed. Cas. 11065, relied upon by petitioner in Point I, the only question before the Court was whether, in case of the sale of a vessel on Marshal's sale, he was required to pay into the registry all of the proceeds of sale less the expenses

of sale, or whether he could first deduct from the proceeds his expenses for care and custody of the vessel. In that case the report shows that the Marshal appointed one Abbott, keeper of the *Phoebe* and expressly authorized him in writing to keep her safely at some safe and convenient wharf (p. 361). The keeper presented a bill for the wharfage which he incurred in this way, which the Marshal considered exorbitant and later had reduced, but in paying the proceeds into Court he deducted the reduced wharfage and other expenses. The Court simply held that he had no right to do this. The Court was dealing with a case where the Marshal's representative was expressly authorized to contract for the wharfage. It did not suggest in any way that a lien for wharfage could arise on a vessel in custody where the wharfage was contracted for by the owner and not the Marshal, or that such wharfage could be called an expense of justice; all of which appears from the extract quoted in petitioner's brief, pages 17, 18, and is made even plainer by the rest of the paragraph of the opinion, as follows, which is omitted by the petitioner:

"Nor is there any hardship in qualifying his lien in this way. She was under arrest on legal process, and he must be presumed to know, for no one can plead ignorance of the law, that his claim for wharfage, like all other claims against the vessel, must be presented to the Court for allowance before it could be paid.

It is further said that the charge in this case is reasonable and moderate, and that if the money were paid into the registry, the Court would immediately order it to be paid out again on the same charge. The answer is, that the Court had no opportunity of informing itself whether it be son-

credible and authentic as not; and it will not be questioned, it being a charge on the property which accrued in the possession of the suit and while it was in the custody of the law, that it is peculiarly the duty of the Court to be satisfied that it is reasonable and proper to be paid, before the claim is allowed." *The Photo*, 1887, 1 Ware (188) 300, Fed. Cir. No. 11,000, page 326.

The petitioner on pages 32 to 35 argues in support of its contention that the case of *The St. Paul*, 275 Fed. 280, is exactly in point with the one at bar. By a fortunate coincidence it happens that the bench of the Circuit Court of Appeals for the Second Circuit that heard and decided *The St. Paul* case and the case at bar, was composed of exactly the same Circuit Judges, Rogers, Taft and Mason, and that the opinions in both cases were unanimous. These Judges may be assumed to know what questions were before them and what they decided. What the Court said, per Rogers, C.J., in its opinion in reply to the argument made by petitioner, is one of particular interest and significance, especially as the Court had before it the record in *The St. Paul* and the facts admitted:

"And content as the argument in this Court told us that this case is on all fours with the case at bar, and fully merits the decree below. We do not as all agree with any such conclusion. There is nothing in *The St. Paul* case which lends support to the doctrine now contended for. The question which the Division Judge decided in the present case, instead of being as he assumed the question which was decided in *The St. Paul*, is precisely the one which was not presented, as

39



litigated, or decided in that case. The wharfage in that case was incurred pursuant to an order made by the Court and with the consent of all the libellants. It was made in the only way in which a maritime lien can be (fol. 220) validly created against property in *custodia legis*, namely, by an order of the Court. The assignment of errors in *The St. Paul* contained no reference to the subject of a lien either maritime or equitable. And an examination of the briefs shows that no question of any kind of lien was in any way discussed therein. There were but two questions before this Court in that case. One was whether this Court could entertain the appeal. The other was the amount of wharfage to be paid and for what period. There is nothing whatever in the opinion as to an equitable lien. The only reference to a lien contained in the opinion is in the following paragraph, which explains why this Court thought it had a right to hear the appeal:

‘The method here pursued is without precedent, and not to be approved as such; but we feel justified in treating the claim as it was below, *viz.*, as a demand for preferential payment, or as an asserted superior lien on the proceeds of the steamship. Consequently a final order refusing (in part) such payment out of, or lien upon, a fund in the registry is the subject of appeal. *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157’ ” (R. 161-162).

*The St. Paul* had loaded a cargo and anchored in New York Harbor without sailing, for a long time. She was libelled by many cargo owners for failure to proceed and taken into custody by the Marshal in April, 1919.

On May 27th, the vessel and cargo were damaged by fire, necessitating beaching, and after she was raised a libel was filed by salvors against the ship and cargo. After reciting the circumstances generally and specifying that in order to preserve the vessel and cargo from further damage, and in order to permit a sale, it was necessary to remove the cargo, an order was entered which provided:

"ORDERED, that the Marshal of this Court be and he is hereby authorized to permit the said Hudson Navigation Company to move the said steamship *St. Paul* from her present anchorage to Pier 32, North River, and to make an arrangement with the said Hudson Navigation Company for the discharge of the said cargo, at Pier 32, North River, the amount of the cost of discharging, storing and caring for the cargo to be subject to the approval of the Court, the said Hudson Navigation Company to look to the said cargo for the payment of the cost of said discharging" (271 Fed. 265).

It is evident from the foregoing that the priority of the Hudson Company's claim for wharfage, afterwards enforced by the Circuit Court of Appeals, was created by the Court on consent of all the interested parties.

On July 17th, discharge was completed, but the *St. Paul* was not removed to another berth until October 8th, and, in the meantime, more or less cargo remained on Pier 32.

On August 5, 1919, an order was entered permitting "the various owners of cargo" to "withdraw their cargo from the custody of the Marshal" on terms which would produce a fund wherewith to pay Hudson Company for unloading and caring for the goods. By the same order

it was referred to a Commissioner to ascertain what should be paid to Hudson Company. *The St. Paul*, 271 Fed. 265.

Before the Commissioner, the Hudson Navigation Company claimed wharfage from July 17th to October 8th, as a lien under the order of June 11th. There was no dispute whatever that the wharfage and similar items were prior liens. These items up to July 17th were actually paid by the cargo without protest. Indeed, in view of the orders of June 11th and August 5th, it is difficult to see how the cargo could have made even a colorable objection to the priority of such charges. The consolidated libellants, however, resisted the allowance of any wharfage and similar items beyond July 17th. The Commissioner held that on July 17th, the berthing of the ship ceased to be a charge against the cargo; but he allowed a charge against the cargo for the use of the pier. The Commissioner's report was confirmed "by an order not complained of", 271 Fed. 266, which shows clearly that the question of lien was not in dispute or before the Appellate Court.

Thereupon the Hudson Company submitted to the United States Marshal a bill for wharfage at Pier 32 from July 17th to October 8th, which the Marshal inserted in his bill of costs against the fund produced by the sale of the vessel. On appeal from taxation, the District Court allowed the wharfage claim from July 17th to August 7th and disallowed all later wharfage. From this decision the Hudson Company appealed.

The Circuit Court of Appeals affirmed the order on the ground that the amount of the award was sufficient, although disapproving of the reason for the decision below.

That Court held that the charges were not in any

case properly taxable as Marshal's costs or disbursements, but in accordance with the attitude of the parties treated the claim as one for services rendered the ship of a kind which might have been enforced by proceedings *in rem* or by petition against the proceeds, that is, as a demand for preferential payment or as an asserted superior lien on the proceeds of the steamship.

That case is clearly distinguished from the present one by the following circumstances which are absent in *The Poznan*: First, the wharfage was incurred on the application or at least with the consent of the consolidated libellants and by the specific order of the Court; secondly, the order of the Court made the entire cost of discharging the vessel a charge in favor of the Hudson Navigation Company; thirdly, the cargo was in the custody of the Marshal and as one of the terms of permitting the cargo to be withdrawn from the custody of the Marshal, the order of August 5th placed on the cargo terms which would produce a fund with which to pay the Hudson Company for unloading and caring for the goods; and fourthly, the contract under which the *St. Paul* was brought to Pier 32 and under the terms of which she remained there, was a contract made between the Hudson Company with, or by the direction of, the Court.

The most important distinction, however, is in the issue presented to the Appellate Court, which in *The St. Paul* was only *quantum* of recovery and not priority of lien.

In the present case, the District Court held that a lien on the lienor's lien was created apparently by operation of law and that such lien was enforceable against the proceeds of the sale of the *Poznan*. That question is precisely the one which was not disputed or litigated in *The St. Paul*, where the Court and all the parties were in

agreement that wharfage, as one of the discharging expenses, was to be paid out of the fund in Court and was to have priority.

The Court held that there was no reason why the *St. Paul* should have been kept at an expensive pier after she was discharged, as then it was merely a case of preservation of the vessel; that the wharfage charge must be reasonable for the *St. Paul*, not for Pier 32 under ordinary conditions; and that what it cost to berth the *St. Paul* at an open pier after she was taken away from Pier 32 was evidence of what a reasonable charge was. As the lower Court, already had awarded \$2,625 for the first 21 days, the Circuit Court of Appeals held that at a reasonable rate such sum was sufficient to cover wharfage for the whole period, and that if anything the Hudson Company had been overpaid. This is all that was decided by the *St. Paul* case, and is direct authority for the proposition that the only wharfage that could be allowed for the *Poznan* was the open wharfage rate of \$29.49 per day at which she was berthed after leaving Pier 6, and that any claim for a greater rate should have been based on an application to the Court on all the facts to enable it to make an appropriate order, deciding what the rate should be and what, if any, charge should be made upon all the cargo instead of cargo of only the consolidated libellants.

The quotation from *The America*, 2 West Law Month. 279; Fed. Cas. 288, found on page 18 of petitioner's brief, dealing with the *Phebe*, *supra*, is meaningless so far as the issues in this case are concerned, for as we have seen in *The Phebe*, the Marshal expressly authorized his keeper to take the vessel to a wharf and he did so, arranging for the wharfage. The sole question in *The*

*America* was the priority of different liens that arose on the vessel. There was no question as to a lien on a vessel in custody.

*The Free Trader*, 1 Brown, Adm. 72, Fed. Cas. 5091, quoted from on page 18, is, when examined, found to be an authority sustaining the respondent's position in the case at bar. *The Free Trader* was seized by the Marshal and sold. By his return he charged \$106 for custodian fees. No vouchers were filed showing payment and no agreement by which he was obligated to pay the same. It is true the Court said, as quoted by the petitioner, that the Marshal was entitled to the necessary expenses which he paid or obligated himself to pay, and no more, but it went on to say:

"It must be established by vouchers or otherwise to the satisfaction of the Court, and cannot be paid except by order of the same."

In *The F. Merwin*, 10 Ben 403, Fed. Cas. 4893, cited by petitioner at page 19, the holding by the Court was entirely in accordance with the respondent's position in this case. There the reasonable and necessary expense of wharfage was actually incurred by the Marshal and paid by him, and it was a question whether it was a proper expense of custody. The Court, per Choate, *J.*, said at page 407:

"The Marshal as the actual custodian of the vessel, *especially if the owner or master leaves her*, would be bound to use reasonable efforts to protect the vessel from danger, while in his custody, as, for instance, to move her in case of fire, or to use proper endeavors to put out a fire." (Italics ours.)

The case of *The Allegheny*, 85 Fed. 463, cited on page

18, has no bearing on the questions at issue here. The Court simply held that, as every admiralty practitioner knows, the reasonable expenses incurred by the Marshal for the safety of the vessel could be ordered paid by the Court before final decree. As a matter of fact, in that case the vessel came into the custody of the Marshal in such a damaged condition that to keep her afloat he did incur considerable expense in preserving the property.

The case of *The Novelty*, 9 Ben. 195, (Fed. Cas. 10368), cited and quoted from by the petitioner (pp. 21, 22), is not in point. Petitioner states (p. 21):

"In sustaining a libel *in rem* for the dockage, District Judge Benedict said: \* \* \*

This is undoubtedly an unintentional mistake. An examination of the report shows that no libel *in rem* whatsoever for the dockage was filed, and there was no question of lien on a vessel either in custody or out of custody involved at all. It was the ordinary application for the taxation of Marshal's fees.

As the Marshal himself made the application for leave to pay the charge, it may well be assumed that he made arrangements for the service.

C. PETITIONER'S CLAIM OF \$16,962.03 FOR WHARFAGE, CLEANING AND DIRT REMOVAL WAS PROPERLY STRICKEN FROM THE MARSHAL'S BILL OF COSTS AND FEES.

Section 829 R. S. provides Marshal's fees,

"for the necessary expenses of keeping boats, vessels or other property attached or libelled in admiralty, not exceeding \$2.50 a day" (4 Stat. 678).

The Act of June 1, 1922, c. 204, provides:

"There shall be paid hereunder any necessary cost of keeping vessels or other property attached or libelled in admiralty in such amount as the court on petition setting forth the facts under oath may allow" (42 Stat. 615).

The change in statute was apparently made in order to permit the Court to allow a greater charge than \$2.50 per day for keeping in custody. The important thing about the statute is that the Marshal has absolutely no right to exceed the amount of \$2.50 per day except upon order of the Court after showing the facts.

The strict limitation upon the power of the Marshal to incur expenses in connection with vessels in custody, even though by incurring same the fund from the sale will be increased, is well illustrated by the case of *The John E. Mulford*, 18 Fed. 455. In that case Judge Brown held that the Marshal is not even authorized to employ an auctioneer on a sale under process in admiralty "at the expense of the parties or of the property or as an incumbrance upon the sale or a charge against the purchases. \* \* \* No auctioneer is required by law upon sales by the marshal, and the latter can make no charges except such as the law expressly authorizes" (p. 456). Under this statute if the Marshal himself had taken the *Poznan* to Pier 6 and expressly contracted for wharfage services, such contract would have been illegal and unenforceable because the \$250 daily charge was based on the facilities for storing and delivering the cargo and greatly in excess of the current rate for berths for safekeeping.

Petitioner argues (pp. 19, 20) that even though the Marshal disclaimed liability for payment of wharfage



(R. 12, 13) and the Circuit Court of Appeals gave weight to such disclaimer (R. 158), still he afterwards acknowledged liability by including such wharfage in his bill of expenses. The agreed statement of fact, however, states (R. 13) :

“The New York Dock Company requested the U. S. Marshal to include *its said claim* as part of the bill of costs submitted by the Marshal which was done by the Marshal.” (Italics ours.)

And it also appears (R. 13) that this item was struck out by the Clerk and by the Court upon objection by libellants and the affidavits of the Marshal and his deputy (R. 25, 26) showing that at no time did they enter into any agreement with the New York Dock Company or make any request to have the SS *Poznan* moored at any of its piers or agree to pay for any such wharfage.

Petitioner argues that no express contract by the Marshal was necessary. He expressly disclaimed any responsibility. How could any implied agreement be inferred? Petitioner points to no evidence. It argues that the Marshal had no more right to keep the *Poznan* at the petitioner's wharf than any private owner; but the petitioner already had a contract with the Polish Company, her owner, that the *Poznan* should be kept at the wharf during her whole discharge, and that was the only contract that petitioner ever had for its wharfage. The Marshal merely took her in custody where he found her, and as we have seen, would not change her location unless it were unsafe or unsatisfactory, or for some other good reason. If the owner and petitioner were satisfied, what excuse could he have to interfere with a contract never terminated or disaffirmed while the *Poznan* was at

Pier 6? Petitioner argues that if the Marshal had paid he would have charged the amount in his bill. But as we have seen from *The St. Paul*, the Court would never have allowed him such an exorbitant sum for wharfage. Petitioner continually refers to the so-called "use" of the wharf by the Marshal. But how did he use it? It was the owner who used it as a berth to discharge cargo.

Moreover, the order confirming the Clerk's action in striking out the wharfage item from the bill of costs was not appealed from by the petitioner, and it is doubtful from Judge Hough's opinion in *The St. Paul* whether such an order is appealable. In *Canter v. The American Ins. Co.*, 3 Peters 307, this Court held that an order dealing only with the allowance of costs is not appealable in admiralty. It cannot be reviewed on this appeal because the question was not dealt with on the trial now to review herein. It was a different hearing at a different time, and no exception or assignment of error was ever taken to the order.

Petitioner argues that had respondent been dissatisfied with what the Marshal did with the vessel, its proper course was to apply to the Court for relief and that on the contrary the respondent opposed the removal of the vessel. There is no evidence whatever that the respondent in this case had anything to do with opposing the removal of the vessel, or that it had any reason to oppose such removal. The only persons who could have opposed it would have been those whose cargo was partly on the vessel and partly on the wharf at the time, as we have seen. But why should the respondent be dissatisfied with what the Marshal did, or why should the respondent apply to the Court? If anybody could have been dissatisfied, it would seem from the complaints of the petitioner that it

was the one. But it never applied to the Court for relief or for the fixing of a lien for reasonable wharfage.

### POINT III.

**Having no maritime lien, petitioner cannot recover in this action on any other theory.**

The District Court having correctly found that the petitioner did not have a maritime lien for the charges in question allowed a recovery on the ground that the wharfage and other charges constituted an equitable lien or charge upon the respondent's maritime lien. This view was thoroughly and adequately disposed of by the Circuit Court of Appeals (R. 161-166).

While conceding in Point VI of its brief that it was not entitled to an equitable lien, the petitioner still seeks in other parts of its brief to reassert in substance the result in the District Court by describing its alleged right as a "right to preferential payment from the proceeds on equitable principles" (Brief, p. 56).

This change in terminology does not alter the fact that the petitioner's position is ultimately based on a right which involves changing the legal relations of parties to property in a way that is done only by a court of chancery, and hence is not within the so-called equity function of an admiralty court. Moreover, the petitioner has not shown any sound basis for an equitable right of any kind.

#### A. THE EQUITABLE RELIEF SOUGHT IS NOT WITHIN ADMIRALTY JURISDICTION.

1. *A non-maritime claim cannot be charged against the general proceeds but only against the remnants and*

*surplus.* This term means the unappropriated remainder of the proceeds after payment of maritime claims. *Benedict, Admiralty*, 5th Edition, Sec. 453.

The power of the admiralty court to dispose of the proceeds of the vessel extends to the payment of non-maritime liens only after maritime liens have been satisfied. *The Lottawanna*, 1874, 21 Wall. 558; *The Ada*, C. C. A. 2nd 1918, 250 Fed. 194, 195; *The Atlantic City*, C. C. A. 3rd, 1915, 220 Fed. 281.

In the present case, as the undoubted maritime liens far exceed the entire proceeds of the vessel (R. 10) there are not any remnants and surplus against which this claim may properly be enforced.

2. *The proceeds of a vessel may be distributed only to those having specific liens thereon.*

While the admiralty court has power to distribute the surplus funds after payment of maritime liens to all those who can show a vested interest therein, in the order of their several priorities, a non-maritime lien will be denied if any technical defect exists therein. *The Lottawanna*, 1874, 21 Wall. 558; *The Edith*, 1876, 94 U. S. 518; *The Willamette Valley*, 1896, 76 Fed. 838; *The Balize*, 1887, 52 Fed. 414; *The Ada*, C. C. A. 2nd, 1918, 250 Fed. 194; *The Atlantic City*, C. C. A. 3rd, 1915, 220 Fed. 281; *The Lydia A. Harvey*, 1898, 84 Fed. 1000; *Miller v. The Peerless*, C. C. Fla. 1891, 45 Fed. 491.

3. *Services rendered to the lienors or to their property do not give rise to a lien or charge on the proceeds of sale.*

The District Court found the petitioner entitled to "an equitable claim on the fund, 'though not a maritime lien on the ship', and in priority to the lienors to protect

whose liens the services were rendered" (R. 38). It also appears in the Supplemental Opinion (R. 40) that the lien allowed by Judge Hand against the fund was based on an equitable claim against the lienors—"a lien on their liens". Such an attempt to impose "a lien on their liens" was unsuccessful in *Sheldrake v. The Chatfield*, 1892, 52 Fed. 495, and in *The Neptune*, C. C. A. 2nd, 1921, 277 Fed. 230, 231.

4. *There is no jurisdiction in admiralty to enforce a right which is purely equitable and does not give rise to a maritime lien.* While an admiralty court acts upon equitable principles, it is not a court of equity and has not any equitable jurisdiction. It cannot change the legal relations of parties to property in the way that is done by a court of chancery. *The Willamette Valley*, 1896, 76 Fed. 838, 844; *The Albert Schultz*, 1882, 12 Fed. 156; *The Ada*, C. C. A. 2nd, 1918, 250 Fed. 194; *Davis v. Child* (Me.), 1840, 2 Ware 78, Fed. Cas. No. 3628; *The Eurana*, C. C. A. 3rd, 1924, 1 Fed. (2nd), 684; *Hill v. The Amelia*, S. D. N. Y. 1873, 6 Ben. 475, Fed. Cas. 6487; affirmed by the Circuit Court 1877, 23 Fed. 406, note; *Kellum v. Emerson*, C. C. (Mass.) 1854, 72 Curt. 79, F. C. No. 7669.

B. NO EQUITY EXISTED IN FAVOR OF THE PETITIONER AS THE RESPONDENT WAS NOT UNJUSTLY ENRICHED AT ITS EXPENSE.

The interest of the lienors as such should not be identified with that of the cargo. Some confusion appears to have resulted from the dual nature of the consolidated libellants' interest; first, as owners of the cargo, and second, as holders of maritime liens against the *Poznan*.

Of course, their interest as cargo owners cannot be affected in this proceeding which is against the ship and her owners and not against the cargo. The trial Judge clearly limited the equitable lien which he found existed to one only on the interests of the consolidated libellants as lienors.

As such they were not benefitted by the service of the petitioner. The large majority of the wharfage service, if not all of it, was rendered to benefit the cargo and not for the protection of the ship or the preservation of the lien upon her and the benefit, if any, derived from not moving the *Poznan* to another dock, was a benefit to the consolidated libellants solely as cargo owners, and not at all as lienors, since the ship could have been as well preserved at some other pier which might have been secured at a little over one-tenth the price which appellee charged for its pier. Subsequent to March 11th, 1921, the vessel was docked at one of the City piers where the charge was \$29.49 per day (R. 20) as compared to \$250, the price of petitioner's pier.

The interests of the consolidated libellants of whom respondent was one, were divergent. Those whose cargo was all on the dock would not have wished further confusion and delay in getting their cargo, caused by the unloading of more cargo on an already congested dock, and those whose cargo was all on the ship would have preferred to have the vessel moved to another dock where their consignments could be discharged more expeditiously, while those who had received all their cargo were not interested at all.

The proceeds of the *Poznan* were not increased in amount or their value otherwise enhanced by reason of the services rendered by the petitioner, and hence the

respondent was not thereby enriched, unjustly or otherwise.

The test of unjust enrichment is benefit to the defendant, not detriment to the plaintiff. The law is clear that where a recovery is allowed on a quasi contractual theory of unjust enrichment, the measure of damages is the unjust enrichment of defendant and not the loss of plaintiff. An illustration of this is a case where a contract is void because of the Statute of Frauds, but a recovery in *quantum meruit* is nevertheless allowed. *Gazzam v. Simpson*, 114 Fed. 71; *Dowling v. McKenney*, 124 Mass. 478; *Matthews v. Davis*, 6 Humpf. 324; *Henderson v. Banker*, 1895, 58 N. J. L. 26. This rule is stated by *Keener, Quasi Contracts*, as follows:

"It is not, however, sufficient to enable the plaintiff to recover for him to prove that he has suffered damage in consequence of the defendant's breach of the contract. He must show that the defendant will, if he is not compelled to pay the plaintiff for that which he has received from the plaintiff, unjustly enrich himself at the plaintiff's expense" (p. 279).

C. THE PETITIONER HAS ALREADY BEEN PAID THE REASONABLE VALUE TO THE "POZNAN" OF THE BERTHING OF THE VESSEL.

The petitioner seeks to establish an equitable claim on the theory that it rendered a valuable service for which it should be paid. The answer to this contention is that the petitioner has already been paid the reasonable value of its alleged services and obviously a claim for anything in excess of reasonable value cannot be supported on equitable grounds.

The situation is strikingly similar to that in *The St. Paul*, C. C. A. 2nd, 1921, 271 Fed. 265, on which the petitioner relies. In that case the Circuit Court of Appeals said:

“\* \* \* if it was preferred to keep her at Pier 32, the charge must be reasonable for the *St. Paul*, not for Pier 32 under ordinary conditions. In fact the order appealed from awarded \$2,625 for the first 21 days of the 82-day period. We think the award should have been a reasonable charge for 82 days, and some evidence of what a reasonable charge was is shown by what it cost to berth the *St. Paul* from October 8th to November 24th, when she was at last sold. Applying this measure, Hudson Company has by the award of \$2,625 been, if anything, overpaid” (p. 267).

In other words, the proceeds of the vessel were held to be chargeable with the reasonable cost of the actual berthing but not for any larger charge based on benefits to the cargo.

In the case at bar when the Marshal contracted for wharfage for *The Poznan*, he secured it at \$29.49 per day (R. 20).

In *The Scow 15*, 88 Fed. 305, 92 Fed. 1008 (C. C. A., 2nd Circ.), the Court held that the rate of wharfage prescribed by the New York Statute in the absence of an express contract with the party to be charged, controlled the rates for wharfage furnished vessels, and that a customary rate of wharfage could not control the rates fixed by the laws of the State of New York, 1882, Section 798, affirming 88 Fed. 305, in which the Statute is set out.



In *The Antonio Zambrana*, 88 Fed. 546 (D. C. E. D., N. Y.), Judge Thomas held that when a vessel in charge of her Marshal was sent by him to a wharf without any contract as to charges, the wharfinger is entitled to the maximum rate fixed by the State Statute of New York, and that when a statute fixes a rate which can be charged for a service given by a person having a public relation such as a wharfinger, he is entitled to receive such sum in the absence of a contract for a less amount, though the actual market rates are much lower.

In *The Allan Wilde*, 255 Fed. 171 (C. C. A., 2nd Circ.), 264 Fed. 291, it was held that the statutory New York wharfage governed in the absence of an express agreement to the contrary.

In *The M. L. C. No. 10*, C. C. A. 2nd, 1926, 10 Fed. (2nd) 699, it was held that where lighters used wharves, even where they knew that the customary charges thereat were greater than the New York statutory rates, or even where notice of such customary rates was given, still such lighters could not be held for wharfage at more than the New York statutory rate in the absence of their express agreement to pay more. It is interesting to note that the libellant in the <sup>M. L. C. No. 10</sup> ~~Southern Cross~~ was the New York Dock Company, the petitioner herein.

This case in effect overrules the decision in *Beard v. Marine Lighterage Corporation*, 1924, 296 Fed. 146 (D. C. E. D., N. Y.), in so far as that case held that a ship owner who uses a wharf after notice of the scale of charges, is liable in accordance with such scale.

In the absence of an express agreement by the Mar-

shal, therefore, the most that could be awarded on an implied contract, if one could possibly be implied from the facts, as a charge against the vessel, was the wharfage at the rate fixed by the New York Statute. This Statute, set forth at length in the *Beard* case (p. 148), provides that it shall be lawful to charge and receive within the City of New York wharfage from every vessel using or making fast to any pier, wharf or bulkhead within the City for every day or part of a day as follows:

"From every vessel of two hundred tons burden and under, two cents per ton; and for every vessel over two hundred tons burden, two cents per ton for each of the first two hundred tons burden, and one-half of one cent per ton for every additional ton \* \* \* (Greater N. Y. Charter, Section 859; Laws 1901, ch. 466).

For the tonnage of the *Poznan* (8,405.72 gross) wharfage at this rate would be a little less than what the Marshal actually paid after March 11th. The *Poznan* was at Pier 6, 78 days, and at \$29.49 a day, wharfage would amount to \$2,300.22. But the petitioner has already received \$9,500 on account of said wharfage (R. 10), so that applying the measure approved in *The St. Paul* case the petitioner has already been greatly overpaid.

Petitioner's witnesses Becker and Firth testified that the reasonable value of the use of one side of a pier for berthing at the time was from \$50 to \$75 per day (R. 67, 68, 74). At this rate the wharfage for the 78 days would amount to \$5,850, so that even on that theory of the case petitioner was greatly overpaid.

It is difficult to understand how the District Court, after first practically deciding that only the berthing charge of \$29.49 per day could be allowed after February 18th when the cargo was all out of the vessel, could

on any theory of the case have allowed more than that rate or the New York statutory rate for that period, including the period after the cargo was all off the pier.

It is also noteworthy that the petitioner has already received about 36% of its claim, whereas the consolidated libellants have received only 17% of their claim (R. 131-2).

**D. PETITIONER'S CLAIM THAT RESPONDENT IS ESTOPPED FROM CLAIMING PROCEEDS AS AGAINST IT IS UNSOUND.**

Petitioner's argument on this point starts, p. 25, on the false assumption that the arrest of the vessel by the Marshal terminated the contract of her owner for the wharfage. No argument or citation is made or given to sustain this. It is elementary law that the seizure of a vessel by the Marshal would not terminate any contract made by her owner with reference thereto, unless there were some specific provision to that effect in the contract. Even if the Marshal refused to permit the vessel to remain at the wharf, the petitioner would still have a cause of action against the owner for failure to keep the vessel there and pay the wharfage. The fact that the petitioner has been denied a lien does not affect in any way the cause of action against the owner under its contract, and instead of cancelling or terminating the contract, the petitioner, as we have seen, expressly extended it by written agreement in December, 1921 (R. 13, 17, 18) so as to provide for payments as late as June, 1922. The statement that the use of the wharf was at the instance and for the benefit of the respondent and other consolidated libellants merely begs the question. We have already proven that it was never at their instance, and in the case of many consolidated libellants, not for their

benefit. Part of the cargo was discharged over the steamer's side into lighters (R. 106). Petitioner, in discussing this point, loosely classes all the cargo owners as consolidated libellants, which they were not; and there is no evidence that they were. But where is the estoppel claim here? What has been said or done by respondent which has misled the petitioner and which it would be inequitable for petitioner to disaffirm? All these elements are necessary for an estoppel, which seems to be all on the other side. Petitioner, by permitting the steamer to remain at the wharf without terminating its contract with her owner, or notifying either the Court or the consolidated libellants that it was letting an enormous bill for unpaid wharfage accumulate, for which it was claiming a lien, surely should be estopped from claiming one. Can it be for a moment doubted that if the consolidated libellants had known that they were to be mulcted with a large sum for wharfage at a totally unsuitable pier, at which it took the vessel over two months and a half to discharge, they would have done their best to get the vessel removed to a suitable wharf, even if several of the shippers still objected?

#### POINT IV.

**A lien for wharfage furnished on the order of the owner does not arise in the absence of an express agreement to give a lien.**

A. THE COURT BELOW PROPERLY DID NOT DECIDE WHETHER WHARFAGE IS A "NECESSARY" UNDER THE ACT OF 1920.

The Circuit Court of Appeals in this case held that no lien arose under the general maritime law because

the contract was made with the owner and not with the master or agent, and because there was not any understanding express or implied that a lien should be given (R. 158-9). The Court below then referred to the enlargement of the right to a maritime lien by virtue of the Acts of 1910 and 1920. After noting that the question of what is now included in the word "necessaries" has not been ultimately determined (R. 160), the Court concluded that the question of whether wharfage is a "necessary" within the meaning of the Act of 1920 was not important in the view of the case taken and said "we express no opinion concerning it at this time" (R. 161).

Under the contentions and views dealt with in other parts of the brief, it is clear that the position of the respondent is the same as that taken by the Circuit Court of Appeals. As the petitioner, however, both in its petition for a writ of certiorari and in its brief, has stressed this question, its contentions must be dealt with, although not necessary to a proper decision of this case.

The petitioner contends in Points III and IV of its brief that under the general maritime law and under the Merchant Marine Act of June 5, 1920, a maritime lien arose for wharfage rendered under its contract with the Polish-American Navigation Corporation.

From paragraphs 4 and 5 of the agreed statement of facts, it appears that on November 30, 1920, the petitioner, New York Dock Company, and Polish-American Navigation Corporation, owner of the *Poznan*, entered into an agreement for the use of Pier 6 by the *Poznan* to discharge her cargo, for which her owner agreed to pay \$250 per day, the charge to begin at 7 a. m. December 1, 1920, and to continue up to the time the steamer left and/or all cargo was removed; that said agreement

was not made with the master of the *Poznan*, which at that time was not in port; that the steamer arrived at Pier 6 during the afternoon of December 2, 1920; and that on the same afternoon the vessel was arrested and taken into custody by the United States marshal for the Southern District of New York (R. 8, 9).

As a lien for wharfage could not under any circumstances arise except as and when the services were actually rendered to the vessel, it is obvious that a maritime lien for wharfage could not have come into existence at least until the time of the *Poznan's* arrival at Pier 6 on the afternoon of December 2nd, a few minutes before the marshal arrested her. *Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.*, 1920, 254 U. S. 1; *Osaka Shoshen Kaisha et al. v. Pacific Export Lumber Company*, 1923, 260 U. S. 490, 499, 506.

B. THE STATUS OF WHARFAGE FURNISHED ON THE ORDER OF THE OWNER BEFORE THE LIEN ACT OF 1910.

No maritime lien arose under the general maritime law unless the credit of the vessel was pledged either by express contract, by presumption of law, or by inference from special facts. In this case, the contract between the petitioner and the shipowner did not contain any express provision concerning a lien. There is not any basis on which a provision to give a lien could be implied into the contract. In fact, the affirmative evidence is that the parties intended that there should not be a lien and that the wharfinger placed reliance exclusively on the Polish-American Navigation Corp.; because the agreement was not made with the master but with the treasurer of the company (R. 8), the wharfinger rendered its bill to the owner and not to the vessel

(R. 9), payments on account from the Polish-American Navigation Corp. were accepted at various times from December 27, 1920, to December 16, 1921 (R. 9-10), no distinction was made by the petitioner between charges for the time before and charges for the time after the arrival of the vessel at the pier (Exhibit C; R. 21), the charges were not based on the tonnage of *The Poznan* (R. 21), and the contract included services for which there obviously could be no lien against the vessel (R. 8).

The facts in many respects are similar to those in *The Advance*, 1894, 60 Fed. 766, affirmed C. C. A. 2d 1896, 71 Fed. 987, in which case Judge Addison Brown denied a lien for wharfage on the ground that the dealings were upon a personal contract between the two companies, which did not look to any credit of the ship but only to the personal responsibility of the owner, and upon the further ground that whatever wharfage privileges were furnished, were furnished under a contract which for a single price per day embraced other valuable considerations, the supply of which would give no lien upon the ship. The Court referred to the excess of the contract rates over the statutory rates, to the fact that the price was not according to tonnage like usual wharfage rates, to the requirement of payment irrespective of the presence of any steamer, to the demand upon the owners for payment, and to the failure to assert a lien until after the owner's failure. 60 Fed. 768.

Before the enactment of the Lien Act of 1910, it was well settled that a lien for supplies furnished on the order of the owner did not arise in the absence of an express or an implied agreement to give it. *The Si. Jago de Cuba*, 1824, 9 Wheat. 409, 416, 417; *The Kalorama*,

10 Wall. 204; *The Valencia*, 1897, 165 U. S. 264, 270; *The Stroma*, C. C. A. 2nd, 1892, 53 Fed. 281, 283-4; *The C. W. Moore*, 1901, 107 Fed. 957, 958; *The Cimbria*, 1914, 214 Fed. 131, 132.

The basis of this theory was laid down in *The St. Jago de Cuba*, 1824, 9 Wheat. 409, in which this Court analyzed the basic reasons for the creation of implied maritime liens as follows:

"The whole object of giving admiralty process and priority of payment to privileged creditors, is to furnish wings and legs to the forfeited hull, to get back for the benefit of all concerned; that is, to complete her voyage.

There are two considerations that fully illustrate this position. It is not in the power of anyone but the shipmaster, not the owner himself, to give these implied liens on the vessel; \* \* \*

For these purposes, the law maritime attaches the power of pledging or subjecting the vessel to material-men to the office of shipmaster; and considers the owner as vesting him with those powers by the mere act of constituting him shipmaster. The necessities of commerce require that, when remote from his owner, he should be able to subject his owner's property to that liability, without which, it is reasonable to suppose, he will not be able to pursue his owner's interests. But when the owner is present the reason ceases, and the contract is inferred to be with the owner himself, on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived." P. 416-7.

The question was again considered in *The Kalorama*,



10 Wall. 204, 214, 215; and the law on this point in effect restated by this Court in *The Valencia*, 1897, 165 U. S. 264, 271, as follows:

"In the absence of an agreement, express or implied, for a lien, a contract for supplies made directly with the owner in person is to be taken as made 'on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived'. *The St. Jago de Cuba*, 9 Wheat. 409, 416, 417."

At pages 38 and 46 of its brief, the petitioner cites an extract from the *St. Jago de Cuba*, *supra*, to show that the principle announced in that opinion does not apply to wharfage. The report does not indicate any of the facts regarding the minor claim for wharfage, which is referred to only in three lines of the opinion. In view of the careful and thorough consideration of the question of the effect of a contract by the owner on the creation of maritime liens for supplies, it is scarcely to be believed that this Court intended to make an exception in the case of wharfage without any expression to that effect; particularly when it is considered that the allowance of that wharfage claim may obviously be explained on the ground that it was furnished on the order not of the owner but of the master.

*Ex Parte Easton*, 1877, 95 U. S. 68, quoted from extensively at page 42 of the petitioner's brief, does not justify the inference placed upon it. It affirmatively appears that there was no contract whatever for the barge in question, which went to the libellant's wharf and by remaining there incurred wharfage charges without any action by the owner whatever. The real point in

that case was as to the maritime character of wharfage and the point actually decided by this Court on writ of prohibition was that the District Court had jurisdiction in admiralty of such a claim.

Petitioner has apparently misunderstood certain remarks of Chief Justice Marshall in the case of *The Little Charles*, 1818, 1 Brock. 347; F. C. No. 15612; petitioner's brief, page 42. The master, it is true, is authorized by the owner to pledge the credit of the vessel in foreign ports and as such contracts are not the master's own contract for which he is responsible, it must be assumed, in the absence of specific proof, that he, in making the contract, intended to use the power conferred on him of pledging the vessel. Where the contract is made by the owner the presumption is directly to the contrary. Undoubtedly the owner would have the authority to pledge his own ship should he so intend but no inference to that effect can be drawn from the mere fact of his making a contract for wharfage. The contract is not the vessel's contract unless made by her master. The point made at page 43 of the petitioner's brief, that a maritime lien is never created by agreement, is sound only if the statement is considered as limited to services and supplies of a non-maritime nature. A maritime lien cannot arise by agreement or otherwise in respect of a service which is not in its nature maritime; but even if the service is maritime, an express agreement to give a lien may be an additional requirement. *Vandewater v. Mills*, 1857, 19 How. 82; *The Owego*, 1923, 292 Fed. 403.

In the absence of an express agreement, a lien for wharfage will be implied where the circumstances are such as to raise a presumption that the parties intended a lien and that the wharfinger relied on

the credit of the vessel, as in the case of a contract by the master. The real reason for permitting a master in a foreign port to make a contract which will bind the credit of the vessel is that the owner is not present to make his own contracts on his own credit or to answer for them.

As far as supplies and repairs are concerned, when the vessel is in her home port, the necessity for the creation of a lien fails and likewise, whether or not she is in her home port, if her owner is present and himself makes the contract, there is no necessity of itself creating a lien but the lien arises only if it be expressly agreed to or inferred from other circumstances. Where, as in the present case, the contract was made with the owner for wharfage beginning to run before the arrival of the vessel, it is perfectly clear that the parties did not intend to pledge the credit of the vessel and under the law as it existed prior to the lien statutes, such a lien did not arise by operation of law.

C. THE STATUS OF WHARFAGE FURNISHED ON THE ORDER OF THE OWNER UNDER THE LIEN ACTS OF 1910 AND 1920.

The situation as it existed under the general maritime law was materially changed by the Lien Act of 1910, which specifically provided that in certain cases supplies and services ordered by the owner should constitute a lien, although it was still open to the supplyman to waive such lien (36 Stat. 604). The language of the later Act of 1920 is similar (41 Stat. 1005).

As wharfage is not specifically included in either of these statutes, the pre-existing rule of the general

maritime law is still in effect with respect to wharfage ordered by the owner himself, unless by proper implication, wharfage may be brought within the class of "other necessities" specified in these statutes.

The underlying question of whether the petitioner could have had a maritime lien for this wharfage, irrespective of all the other questions discussed in other parts of this brief, depends ultimately on this question of construction.

Section 1 of the Act of June 23, 1910, c. 373, provides as follows:

"Any person furnishing repairs, supplies, or other necessities, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel" (36 Stat. 604).

This section was re-enacted by the Act of June 5, 1920, c. 250, Sec. 30, Subsec. P, to read as follows:

"Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessities, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel" (41 Stat. 1005).

Careful investigation has revealed only one case in which the question of whether wharfage is a "necessary" under the Act of 1920 has been expressly decided. *The Suelco*, 1922, 286 Fed. 286.

That case was a libel *in rem* against the SS. *Suelco* for wharfage. The Court held as follows:

"The lien claimed is a maritime lien. Wharfage is, of course, a necessity but not a 'necessary' in the sense in which the word is used in the Statute of 1920. *The Andrew J. Smith* (D. C.), 263 Fed. 1004; *The Hatteras*, 255 Fed. 518, 166 C. C. A. 586; *The J. Doherty* (D. C.), 207 Fed. 997; *The Muskegon* (C. C. A.), 275 Fed. 348." P. 288.

The petitioner contends on page 49 of its brief that in the District of Maryland it has been held that the Act is applicable to wharfage. *The West Haven*, 1924, 297 Fed. 534. In that case, the particular point apparently was not raised and the opinion does not even refer to the status of wharfage under the Act of 1920. As the libel was dismissed without considering this question, *The West Haven* is scarcely authority contrary to *The Suelco*.

Under the 1910 Act it was held that towage and stevedoring did not come within the terms of the statute because they were not within the class indicated by the words "repairs and supplies". *The J. Doherty*, 1913, 207 Fed. 997; *The Muskegon*, 1921, 275 Fed. 117; affirmed 275 Fed. 348.

In *The Muskegon*, C. C. A. 2nd, 1921, 275 Fed. 348, Judge Hough held that "other necessities" in the 1910

Act did not cover the services of a master stevedore, and expressed adherence to the views expressed in *The Oceania*, C. C. A. 2d, 1917, 244 Fed. 80, and *The Hatteras*, C. C. A. 2nd, 1918, 255 Fed. 518, in which decisions "other necessities" were held not to cover towage. The Court referred to the reasoning in *The J. Doherty* as being "as fatal to appellant's contention regarding stevedoring as it was in respect of towage before by the act of 1920 the word 'towage' was specifically inserted. 'Other necessities' mean matters *ejusdem generis* with repairs and supplies and that the charge of a master stevedore does not belong to that class is we think entirely plain." P. 350.

It is contended, however, that the changes in the wording of the Act of 1910 made by the Act of 1920 have broadened the scope of the Statute so as to include wharfage under certain language in recent decisions on stevedoring cited by the petitioner.

In *The Henry S. Grove*, 1922, 285 Fed. 60, a stevedore intervened and asserted a maritime lien under the Act of 1920. The Court compared the language of the two statutes and held that the express addition of "towage" and the insertion of "dry dock or marine railway" in that part of the act preceding the expression of "or other necessities" has, by so doing, broadened the scope of the latter expression. P. 61.

It is submitted that this reasoning is not sound. The broadening of the meaning of the statute is said to depend on the transposition of the words "other necessities"; but "other necessities" having for many years received judicial construction, there would seem to be more reason to consider that the Legislature intended to carry over the fixed meaning of those words

rather than completely to alter such fixed meaning and merely by changing the position of these words to change their meaning to the exact opposite of the construction previously placed upon them. Such a result would seem to be in conflict with sub-section X of section 30 of the Merchant Marine Act of 1920, which in repealing the Lien Act of 1910 provides as follows:

“This section, however, so far as not inconsistent with any of the provisions of law so repealed, shall be held a reenactment of such repealed law \* \* \*” (41 Stat. 1006).

The actual intention of Congress in passing the Ship Mortgage Act, 1920, was not to change the existing law as to maritime liens, except so as to include towage as a maritime lien, as is shown by the Conference Reports on the bill, *House Committee Reports, 66th Congress, Second Session, December 1, 1919-June 5, 1920*; Reports numbered 1093, 1102, 1107, dated June 2, 3, 4, 1920. Appended to each of these reports is “The Statement of the Managers on the Part of the House” which sets forth the Ship Mortgage Act, 1920, in full, designated as Senate Amendment No. 135. In each report there appears the following in the Managers’ statement:

“The Senate Amendment also reenacts the Maritime Lien Act of 1910 with the additional grant of a lien for towage in the home port of a vessel, and the declaration that towage shall be presumed to be furnished upon the credit of a vessel.”

The foregoing is all that is said in the reports about the maritime lien provisions of the Ship Mortgage Act, and the Managers’ statement in each instance concludes

with a recommendation that the Senate amendment be adopted without change.

The Act of 1920 should, therefore, be construed in the same way as the Act of 1910, except insofar as its provisions are actually inconsistent with those of the earlier act.

As it is clear that towage and stevedoring were not considered as "other necessities" under the Act of 1910, *The Hatteras*, C. C. A. 2nd, 1918, 255 Fed. 518; *The J. Doherty*, 1913, 207 Fed. 997, 999, 1000, and that it was necessary expressly to include towage in the Lien Act of 1920 in order that by the statute a lien therefor should arise in favor of towage supplied on the order of an owner, wharfage should not rest on any basis more favorable to the lienor. Therefore, a lien in favor of the wharfinger for wharfage rendered on the order of the owner should not be considered as within the statute in the absence of an express provision to that effect.

The extension of "other necessities" to include wharfage is contrary not only to the terms of sub-section X and to the construction previously placed upon these words, but also to the policy repeatedly declared by this Court that maritime liens on account of their secret nature should not be extended by construction, analogy, or inference, and also to the policy that a statutory extension of a right should be construed strictly and not extended beyond the requirements of the plain language of the statute. *Vandewater v. Mills*, 1857, 19 How. 82; *Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.*, 1920, 254 U. S. 1, 11, 12; *New Bedford Dry Dock Co. v. Purdy*, 1922, 258 U. S. 96, 100; *Osaka Shosen*



*Kaisha et al. v. Pacific Export Lumber Co.*, 1923, 260 U. S. 490, 499.

The argument that the change in the statute so as to place the words "dry dockin " before instead of after the words "other necessities" has the effect of bringing wharfage within the statute because it is of the same nature as dry docking, is not sound. Wharfage, strictly speaking, is a charge for the use of a wharf by a vessel in the ordinary course of her employment as an instrument of commerce; while dry docking is an incident to repairs or examination, the necessity for which in itself is scarcely consistent with the use of the vessel as an instrument of commerce at that particular time.

The nature of wharfage has been pointed out by this Court in the case cited by the petitioner, *In re Easton*, 1877, 95 U. S. 68, 73, 75, as follows:

"Wharf accommodation is a necessity of navigation, and such accommodations are indispensable for ships and vessels and water-craft of every name and description, whether employed in carrying freight or passengers, or engaged in the fisheries \* \* \*." P. 73.

"Repairs to a limited extent are sometimes made at the wharf; but contracts of the kind usually have respect to the voyage, and are made to secure a resting-place for the vessel during the time she is being loaded or unloaded." P. 75.

Wharfage and dry docking are, therefore, not to be considered in the same class.

Finally, if the intention of Congress was to include wharfage among "other necessities", it is difficult to understand why it was not specifically inserted in the

Act of 1920. The fact that towage was added suggests that the attention of Congress was directed to the exact services for which a lien should arise, even when ordered by the owner, and the omission of wharfage indicates that Congress intended that the lien law in this regard should remain as it was before the Act of 1920.

This view has the support of an experienced and learned admiralty practitioner, John W. Griffin, Esq., who writes in regard to this point as follows:

"It seems going rather far to assume that Congress, by the addition of the word 'towage' meant to bring in, by implication, all services which are, to use Judge Hough's phrase, 'convenient, useful and at times necessary' to the operation of a ship. If Congress, knowing the construction which the Courts have put upon the Act, meant to include anything besides towage, why did it not say so?" Griffin, *The Federal Maritime Lien Act*, 37 Harv. Law Rev. 15, 21.

Some support for the result in *The Henry S. Grove* may be found, as Mr. Griffin states, in the enumeration among preferred maritime liens in sub-section M of the Ship Mortgage Act of a lien for the wages of a stevedore when employed directly by the owner. But it is likewise significant that a lien for wharfage does not appear in sub-section M as a lien, and in that respect wharfage is to be treated differently from stevedoring.

**POINT V.**

***The decision of the United States Circuit Court of Appeals for the Second Circuit should be affirmed, with costs.***

Respectfully submitted,

HUNT, HILL & BETTS,  
*Proctors for Intervenor-Respondent.*

GEO. WHITEFIELD BETTS, JR.,  
MARK W. MACLAY,  
EDNA F. RAPALLO,  
*Of Counsel.*

New York, March 3, 1927.

## Appendix A.

ACT JUNE 23, 1910 (36 Stat. 604, 605).

### Section 1:

"Any person furnishing repairs, supplies, or other necessities, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel."

### Section 2:

"The following persons shall be presumed to have authority from the owner or owners to procure repairs, supplies, and other necessities for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel."

### Section 3:

"The officers and agents of a vessel specified in section two shall be taken to include such officers and agents when appointed by a charterer, by an owner *pro hac vice*, or by an agreed purchaser in possession of the vessel, but nothing in this Act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement

for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessities was without authority to bind the vessel therefor."

Section 4:

"Nothing in this Act shall be construed to prevent a furnisher of repairs, supplies, or other necessities from waiving his right to a lien at any time, by agreement or otherwise, and this Act shall not be construed to affect the rules of law now existing, either in regard to the right to proceed against a vessel for advances, or in regard to laches in the enforcement of liens on vessels, or in regard to the priority or rank of liens, or in regard to the right to proceed *in personam*."

Section 5:

"This Act shall supersede the provisions of all state statutes conferring liens on vessels in so far as the same purport to create rights of action to be enforced by proceedings *in rem* against vessels for repairs, supplies, and other necessities."

## Appendix B.

SHIP MORTGAGE ACT, 1920 (Section 30 of Merchant Marine Act, June 5, 1920), (41 Stat. 1004, 1005, 1006).

### Subsection M:

"(a) When used hereinafter in this section, the term 'preferred maritime lien' means (1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this section; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit *in rem* in admiralty for the enforcement of a preferred mortgage lien thereon, all pre-existing claims in the vessel, including any possessory common-law lien of which a lienor is deprived under the provisions of subsection L shall be held terminated and shall thereafter attach, in like amount and in accordance with their respective priorities, to the proceeds of the sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court."

### Subsection P:

"Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessities, to any vessel, whether foreign or do-

mestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel."

**Subsection Q:**

"The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, and other necessities for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel."

**Subsection R:**

"The officers and agents of a vessel specified in subsection Q shall be taken to include such officers and agents when appointed by a charterer, by an owner *pro hac vice*, or by an agreed purchaser in possession of the vessel; but nothing in this section shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessities was without authority to bind the vessel therefor."

**Subsection S:**

"Nothing in this section shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or other neces-

saries, or the mortgagee, from waiving his right to a lien, or in the case of a preferred mortgage lien, to the preferred status of such lien, at any time, by agreement or otherwise; and this section shall not be construed to affect the rules of law now existing in regard to (1) the right to proceed against the vessel for advances, (2) laches in the enforcement of liens upon vessels, (3) the right to proceed *in personam*, (4) the rank of preferred maritime liens among themselves, or (5) priorities between maritime liens and mortgages, other than preferred mortgages, upon vessels of the United States."

Subsection T:

"This section shall supersede the provisions of all State statutes conferring liens on vessels, in so far as such statutes purport to create rights of action to be enforced by suits *in rem* in admiralty against vessels for repairs, supplies, towage, use of dry dock or marine railway, and other necessities."

Subsection X:

"Sections 4192 to 4196, inclusive, of the Revised Statutes of the United States, as amended, and the Act entitled 'An Act relating to liens on vessels for repairs, supplies, or other necessities', approved June 23, 1910, are repealed. This section, however, so far as not inconsistent with any of the provisions of law so repealed, shall be held a reenactment of such repealed law, and any right or obligation based upon any provision of such law and accruing prior to such repeal, may be prosecuted in the same manner and to the same effect as if this Act had not been passed."



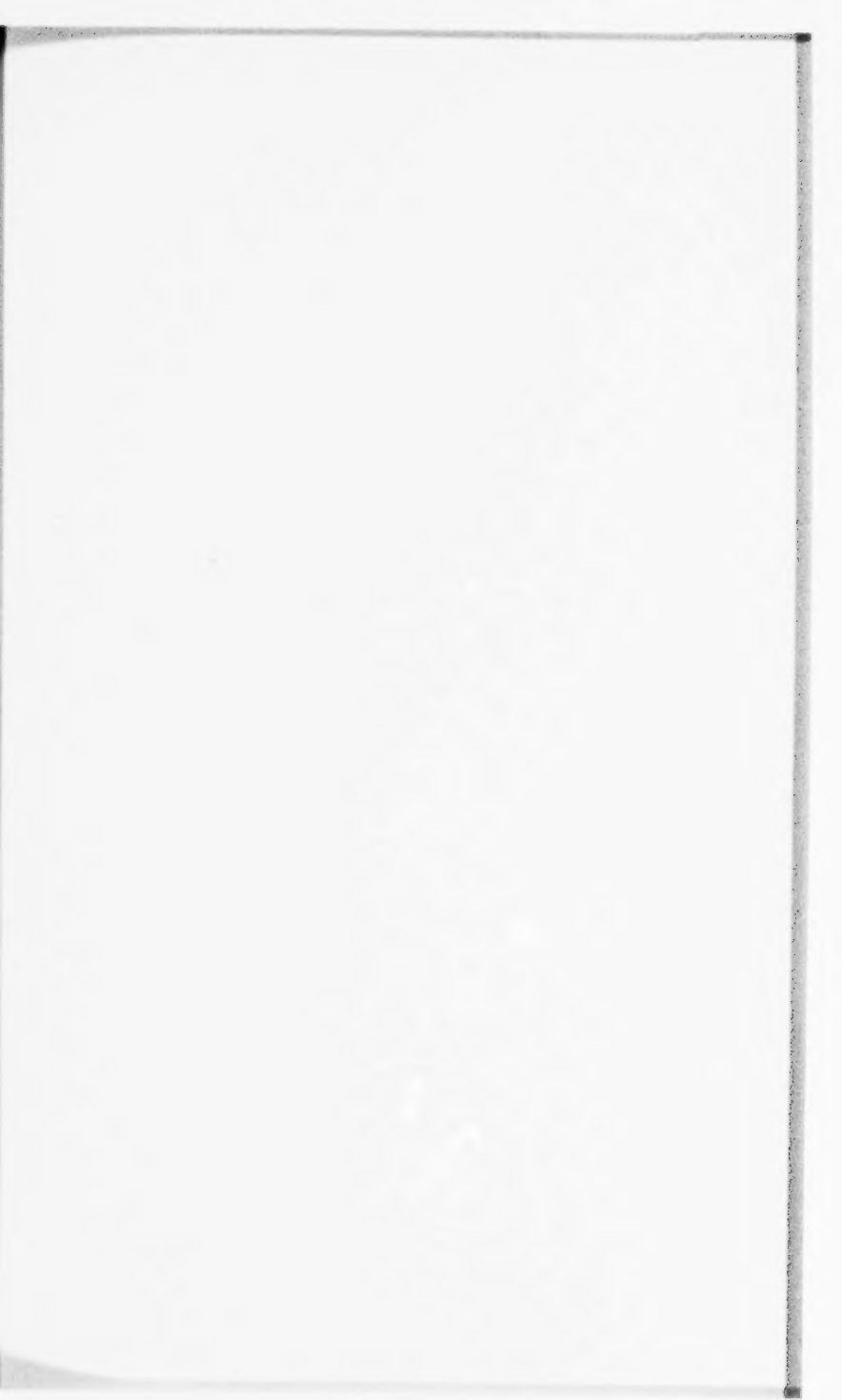
**Appendix C.****GREATER NEW YORK CHARTER, §859.****Laws, 1901, ch. 466.**

§859. It shall be lawful to charge and receive, within The City of New York, wharfage and dockage at the following rates, namely: From every vessel that uses or makes fast to any pier, wharf, or bulkhead, within said city or makes fast to any vessel lying at such pier, wharf, or bulkhead, or to any other vessel lying outside of such vessel, for every day or part of a day except as hereinafter provided, as follows: From every vessel of two hundred tons burden and under, two cents per ton; and for every vessel over two hundred tons burden, two cents per ton for each of the first two hundred tons burden, and one-half of one cent per ton for every additional ton, except that, save as hereinafter provided, vessels known as North river barges, market boats and barges, sloops employed upon the rivers and waters of this state, and schooners exclusively employed upon the rivers and waters of this state shall pay for every such vessel under the burden of fifty tons, at the rate of fifty cents per day; for every such vessel of the burden of fifty tons, and under the burden of one hundred tons, at the rate of sixty-two and a half cents per day; for every such vessel of the burden of one hundred tons, and under the burden of one hundred and fifty tons, at the rate of seventy-five cents per day; for every such vessel of the burden of one hundred and fifty tons, and under the burden of two hundred tons, at the rate of eighty-seven and a half cents per day; and for every such vessel of the burden of two hundred tons, and under the burden of two hundred and

fifty tons, at the rate of one hundred cents per day; for every such vessel of the burden of two hundred and fifty tons, and under the burden of three hundred tons, at the rate of one hundred and twelve and a half cents per day; for every such vessel of the burden of three hundred tons, and under the burden of three hundred and fifty tons, at the rate of one hundred and twenty-five cents per day; for every such vessel of the burden of three hundred and fifty tons, and under the burden of four hundred tons, at the rate of one hundred and thirty-seven and a half cents per day; for every such vessel of the burden of four hundred tons and under the burden of four hundred and fifty tons, at the rate of one hundred and fifty cents per day; for every such vessel of the burden of four hundred and fifty tons, and under the burden of five hundred tons, at the rate of one hundred and sixty-two and a half cents per day; for every such vessel of the burden of five hundred tons, and under the burden of five hundred and fifty tons, at the rate of one hundred and seventy-five cents per day; for every such vessel of the burden of five hundred and fifty tons, and under the burden of six hundred tons, at the rate of one hundred and eighty-seven and one-half cents per day; for every such vessel of the burden of six hundred tons and upwards, to pay twelve and a half cents, in addition for every fifty tons in addition to the rate last mentioned, for every day such ship or vessel shall use or be made fast to any of said wharves; but no boat or vessel over fifty tons burden shall pay less than fifty cents for a day or a part of a day, and the class of sailing vessels now known as lighters shall be at one-half the first above rates. Every other vessel making fast to a vessel at any pier, wharf, or bulkhead within said city, or to another vessel outside of such vessel, or

at anchor within any slip or basin, when not receiving or discharging cargo or ballast, one-half of the first above rates; and from every vessel or floating structure, other than those above named, or used for transportation of freight or passengers, double the first above rates, except that floating grain elevators shall pay one-half the first above rates; and every vessel that shall leave a pier, wharf, bulkhead, slip or basin, without first paying the wharfage or dockage due thereon, after being demanded of the owner, consignee, or person in charge of the vessel, shall be liable to pay double the rates established by this section.

*End*



# SUPREME COURT OF THE UNITED STATES.

No. 229.—OCTOBER TERM, 1926.

|   |   |  |
|---|---|--|
| New York Dock Co., Petitioner,<br>vs.<br>Steamship "Poznan", her engines, etc.,<br>and John B. Harris Co. | } | On Writ of Certiorari to<br>the United States Cir-<br>cuit Court of Appeals<br>for the Second Circuit. |
|---|---|--|

[April 11, 1927.]

Mr. Justice STONE delivered the opinion of the Court.

This case involves the right of a wharf owner to preferential payment from the proceeds of a vessel, for wharfage furnished the vessel while in the custody of a United States marshal under a warrant of arrest in admiralty. The owner of the S.S. Poznan entered into a contract with petitioner, the owner of a private pier in New York harbor, for the use of the pier for discharging cargo from December 1, 1920 until completion. The rate agreed upon was \$250 per day, plus certain incidental charges not now material. On December 2, 1920, the Poznan was made fast to the pier. Later in the day, she was arrested by the United States marshal for the district upon libels, afterward consolidated into a single cause, for non-delivery of the vessel's cargo and for damages for breach of contracts of affreightment. The marshal allowed the vessel to remain at the pier. Later, on application of one of the libelling cargo owners, the district court ordered the delivery of a part of the cargo which that libellant had shipped and made the order applicable to all other libellants who should make a like claim. The discharge of the cargo was then begun and deliveries were made to the several libellants in the consolidated cause, including respondent, the John B. Harris Co.

After the cargo had been about one-half discharged, the charterer applied to the district court for leave to move the vessel to another pier where the cargo could be removed more expeditiously. But on request of some of the libellants and a committee representing the shippers, the application was denied on January 5, 1921. The

vessel was unloaded by February 18, 1921. Delivery of the cargo from the pier was completed March 1, 1921, but the vessel remained fast to the pier to and including March 11, 1921, when she was removed.

Meanwhile, the marshal having declined to pay the bill for wharfage without an order of the court, petitioner, in April, 1921, filed its libel against the vessel for the balance of wharfage charges unpaid, aggregating \$17,462. By order of the district court, the libellants in the consolidated cause were permitted to intervene. Respondent, the John B. Harris Co., served notice of intervention, and filed its answer denying the allegations in the libel and praying that it be dismissed on the ground, among others, that the wharfage was furnished while the vessel was in the custody of the marshal, and hence no maritime lien could arise. Respondent has since prosecuted the defense in behalf of all the other libellants in the consolidated cause.

The vessel was later sold under an order in the consolidated cause and the proceeds, which were not enough to satisfy the libellants, paid into the registry of the court. The libellants in the consolidated suit have made common cause by stipulation that the recovery under the final decree should be paid to trustees and distributed in accordance with the instructions of a committee representing all of them. The committee found the total claims of the libellants to exceed the amount of the proceeds of the ship. A pro rata distribution has been made to the claimants and an adequate amount reserved to pay the demand of the petitioner, if allowed in this suit. The marshal although refusing petitioner's request for payment of the wharfage charge, nevertheless included it in his bill of costs and expenses in the consolidated cause and charged his commission on this amount. The court disallowed these items but "without prejudice to any rights of the New York Dock Company to have recourse against the proceeds of the vessel . . ."

The district court, in the present libel, allowed as a preferential payment from the proceeds of the ship, the reasonable value of the benefits resulting to the consolidated libellants from the wharfage and incidental service furnished by petitioner, to be determined by a special master. This was found by the master and held by the district court to be the reasonable value of the wharfage. A decree for this amount, less certain payments on account made by

the owner of the ship, pursuant to the original contract of wharfage, 297 Fed. 345, was reversed by the circuit court of appeals for the second circuit. 9 Fed. (2d) 838. This Court granted certiorari. 269 U. S. 547.

The court below held that as the wharfage was furnished after the arrest of the ship, and while it was in the custody of the law, no maritime lien could attach, and that a preferential payment could not be supported upon any other theory applicable to the facts of this case.

A question much argued, both here and below, was whether the case could be considered an exception to the general rule that there can be no maritime lien for services furnished a vessel while in *custodia legis*. Cf. *The Young America*, 30 Fed. 789; *The Nissequogue*, 280 Fed. 174; *Paxson v. Cunningham*, 63 Fed. 132; *The Willamette Valley*, 66 Fed. 565. But in the view we take, the case does not turn upon possible exceptions to that rule, as we think petitioner's right of recovery depends, as the district court ruled, not upon the existence of a maritime lien, but upon principles of general application which should govern whenever a court undertakes the administration of property or a fund brought into its custody for the benefit of suitors.

The libellants in the consolidated cause were not only concerned as owners in securing delivery of the cargo, but as lienors they were interested in the ship and, as eventually appeared, in the whole of her proceeds. Service rendered to the ship after arrest, in aid of the discharge of cargo, and afterward pending the sale, necessarily inured to their benefit, for it contributed to the creation of the fund now available to them. The most elementary notion of justice would seem to require that services or property furnished upon the authority of the court or its officer, acting within his authority, for the common benefit of those interested in a fund administered by the court, should be paid from the fund as an "expense of justice." *The Phebe*, 1 Ware, 354, 359, Fed. Cases 11065. This is the familiar rule of courts of equity when administering a trust fund or property in the hands of receivers. The rule is extended, in making disposition of the earnings of the property in the hands of the receiver, to require payment of sums due for supplies furnished before the receivership, where their use by the debtor or receiver in the operation of the property has produced the earnings. See *Fosdick v. Schall*, 99 U. S. 235; *Thomas v. Western Car Co.*, 149

U. S. 95, 110; *Virginia & Alabama Coal Co. v. Central R. R.*, 170 U. S. 355; *St. Louis, &c. R. R. v. Cleveland, &c. Ry.*, 125 U. S. 658, 663, 673; *Southern Ry. v. Carnegie Steel Co.*, 176 U. S. 257; *Pennsylvania Steel Co. v. New York City Ry.*, 208 Fed. 168; *Pennsylvania Steel Co. v. New York City Ry.*, 216 Fed. 458, 470.

Such preferential payments are mere incidents to the judicial administration of a fund. They are not to be explained in terms of equitable liens in the technical sense, as is the case with agreements that particular property shall be applied as security for the satisfaction of particular obligations or vendors' liens and the like, which are enforced by plenary suits in equity. They result rather from the self-imposed duty of the court, in the exercise of its accustomed jurisdiction, to require that expenses which have contributed either to the preservation or creation of the fund in its custody shall be paid before a general distribution among those entitled to receive it.

We need not inquire here into the exact limits of the powers of courts of admiralty to administer equitable relief as distinguished from that peculiar to the courts of admiralty. This is not a suit, as the court below seemed to think, for the enforcement of an equitable lien. The court of admiralty is asked, in the exercise of its admiralty jurisdiction, to administer the fund within its custody in accordance with equitable principles as is its wont. Cf. *United States v. Cornell Steamboat Co.*, 202 U. S. 184, 194; *The Eclipse*, 135 U. S. 599, 608; Benediet, *Admiralty*, 5th Ed., § 70. It is defraying from the proceeds of the ship in its registry an expense which it has permitted for the common benefit and which, in equity and good conscience, should be satisfied before the libellants may enjoy the fruits of their liens.

Such a preferential payment from the proceeds of the ship, for wharfage furnished to her while in custody, was allowed by the court below in *The St. Paul*, 271 Fed. 265. But in the present case, that court thought that *The St. Paul* case was to be distinguished on the ground that there the wharfage service was furnished and the obligation incurred in accordance with an order made by the court and with the consent of the libellants. But here the court denied a motion to remove the ship from petitioner's wharf with the consent of some of the libellants and with full knowledge of all concerned that the wharfage was then being furnished. The libellants in the consolidated cause, who are united in interest with respondent in



the present case, thus appear to have acquiesced in this determination. We are unable to perceive any basis for a distinction between action of the court in authorizing the ship to proceed to the wharf to enable it to discharge its cargo in the one case, and authorizing it to remain there for a like purpose in the other. It is enough if the court approves the service rendered or permits it to be rendered, and it inures to the benefit of the property or funds in its custody.

Objection is made that the amount found by the special master and confirmed by the district court as the reasonable value of the wharfage furnished is excessive, but this issue of fact was fairly tried. The finding of the special commissioner is supported by the evidence and should not be disturbed here. Respondent attempts to raise here questions with respect to the amount of recovery which were neither raised nor considered below. We have examined them only so far as is necessary to ascertain that no error was committed by the district court so plain or apparent as to warrant our consideration on such a state of the record. Cf. *Pierce v. United States*, 255 U. S. 398, 405; *Hiawassee Power Co. v. Carolina-Tenn. Co.*, 252 U. S. 341; *Ill. Cent. R. R. v. Mulberry Coal Co.*, 238 U. S. 275, 281; *Givens v. Zerbst*, 255 U. S. 11, 22; *Tilden v. Blair*, 21 Wall, 241, 249.

The decree below must be reversed and that of the District Court reinstated.

*Reversed.*

Mr. Justice HOLMES took no part in the consideration and decision of this case.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*